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AMERICAN CRIMINAL REPORTS.

A SERIES DESIGNED TO CONTAIN THE LATEST
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CRIMINAL CASES

DETERMINED IN

THE FEDERAL AND STATE COURTS IN THE UNITED STATES,

AS WELL AS

SELECTED CASES,

IMPORTANT TO AMERICAN LAWYERS,

FROM THE ENGLISH, IRISH, SCOTCH AND CANADIAN
LAW REPORTS,

WITH

NOTES AND REFERENCES.

VOL. XI.

EDITED BY

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PUBLISHERS' NOTICE.

The publishers' aim in bringing out this volume has been to give the bar of this country as complete a collection of the many cases within the period covered as possible; and as some were peculiarly forceful and applicable to the topics discussed, to reinforce them with appropriate and ample annotations, so that the doctrines involved could be fully and clearly presented for ready consultation.

It will be observed that several subjects of growing importance are presented with unusual distinctiveness, notably, Alibi, Argument of Counsel, Confessions, Criminal Complaints, Judge and Jury, etc.

By a discriminating selection it was possible to attain this purpose of giving an unusual number of cases and of topics within the compass of this volume.

In having our design carried out we fortunately secured editors of practical experience as well as of critical knowledge.

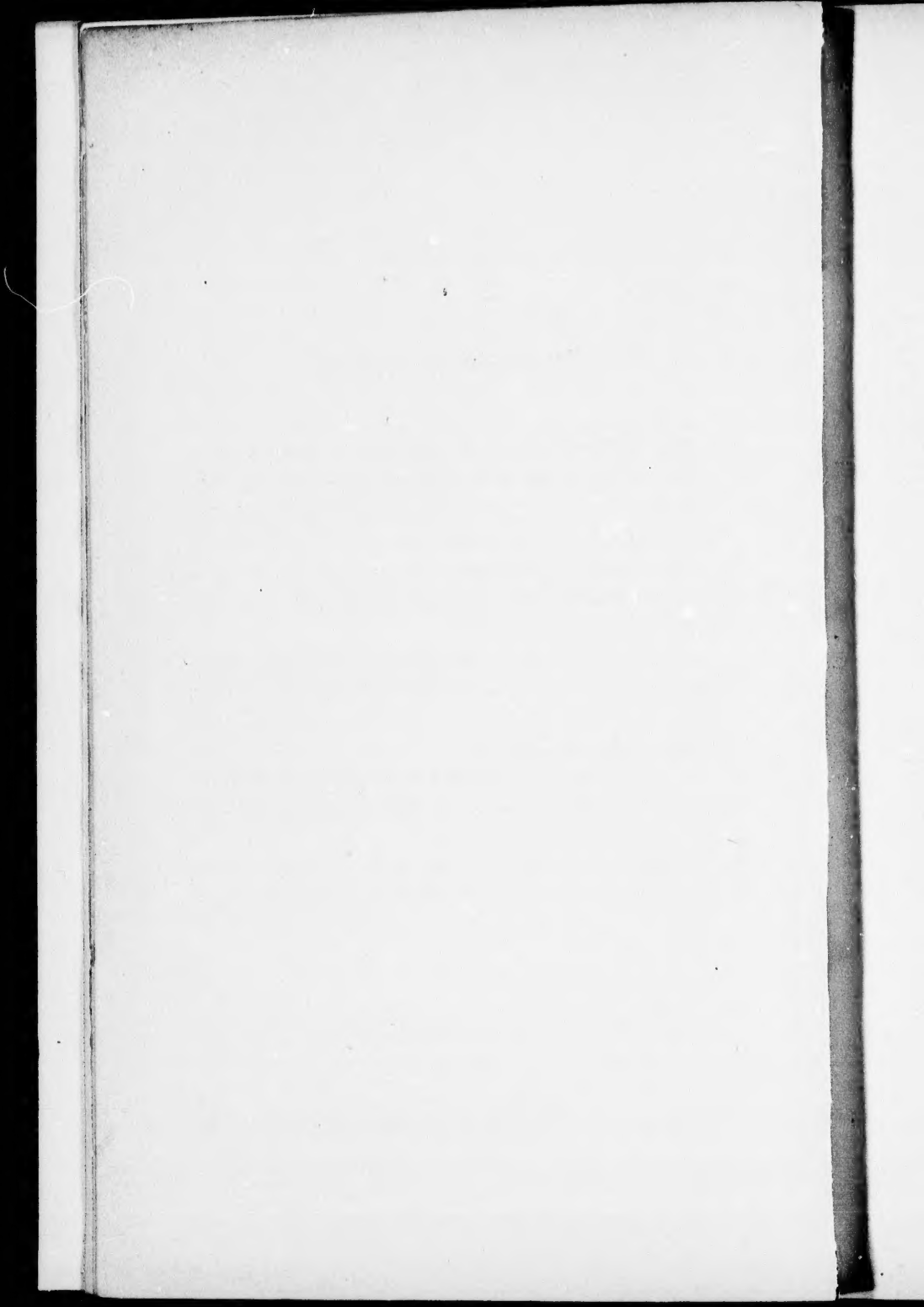


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AMERICAN CRIMINAL REPORTS.

ARMSTRONG V. STATE.

101 Tenn. 389—47 S. W. Rep. 492.

Decided October 18, 1898.

ABATEMENT: *Verification of plea in abatement.*

"The defendant makes oath that the statements in the above plea are true," is a good verification.

Appeal in error from Circuit Court of Hamilton County;
Hon. Floyd Estill, Judge. Reversed.

Cleft & Cummings, for the appellant.
Attorney-General Pickel, for the State.

CALDWELL, J. Albert Armstrong was indicted for the larceny of a watch. The person arrested under that indictment filed a plea of misnomer in abatement. This plea was stricken out, because, in the opinion of the court, not sufficiently verified. The defendant refused to plead further, and thereupon the court directed a plea of not guilty to be entered. Upon the issue thus formed the defendant was tried, convicted, and sentenced to serve four years in the penitentiary. Motions for a new trial and in arrest of judgment were then successively made and overruled. The defendant appealed in error to this court, and here insists that his plea was improperly stricken out. The verification of the plea was in these words: "The defendant makes oath that the statements in the above plea are true." This the trial court ruled to be fatally defective, because not followed by the additional clause, "in substance and in fact." In this ruling

the court below was in error. The affidavit was sufficient as made, and the addition of the other words could have made it no better. The statute prescribes no particular form of verification. Its language is: "No plea in abatement shall be received in any court, unless its truth is verified by the oath of the party or otherwise." Code, § 2901; M. & V., § 3611; Shannon, § 4622. If the defendant makes oath, as in this case, that the statements in his plea are true, "its truth is verified by the oath of the party;" and that is all the statute requires. If he swears the plea is true, the truth of the plea is verified by his oath, and the use of the words "in substance and in fact" add nothing to its legal effect.

Judge Caruthers, than whom no better pleader under the code has been known, gives, as a proper and sufficient form of verification of a plea in abatement, the following: "The defendant makes oath that the above plea is true." Hist. Lawsuit (Ed. 1866), sec. 185. In Martin's edition of the same work the clause, "in substance and in fact," is added. Hist. Lawsuit (Martin), sec. 83. The latter form is the one given by Chitty (2 Chitty Pl. 445), and is in rather general use. 1 Enc. Pl. & Pr. 29; 1 Enc. Forms, 26, 27, and citations. The form is undoubtedly good, yet it is not the only one that is good. The requirement is, that the affidavit as to the truth of the plea must be positive and leave nothing to be collected by inference. *Bank v. Jones*, 1 Swan, 391; *Wrompelmier v. Moses*, 3 Bax. 470. In the *Bank Case* the statement was that the affiant "is informed and believes that the above plea is true in substance and matter of fact." The court said the affidavit was insufficient, because made on information and belief rather than upon knowledge; that the affidavit must be positive, stating "that the plea is true in substance and fact;" not meaning by the latter, however, to prescribe an exact form, but only to say what was requisite, as contradistinguished from a verification on information and belief. 1 Swan, 392. In the *Wrompelmier Case* the affidavit was, that the "facts stated in the plea are true, to the best of his knowledge, information, and belief." The court said the verification would have been good if it had stopped with the statement that the "facts stated in the plea are true," but that it was rendered uncertain and insufficient by the qualifying words

added. 3 Bax. 470. The verification in the present case is positive, absolute, and unqualified, and, being so, it is entirely sufficient.

Reversed and remanded.

TAYLOR v. STATE.

105 Ga. 846—33 S. E. Rep. 190.

Decided March 4, 1899.

ABORTION: CHILD ALIVE OR NOT: *Instruction thereon—New trial.*

1. The word "child," as used in section 81 of the Penal Code, means a "living child;" that is to say, "an unborn child so far developed as to be ordinarily called 'quick,'" and which is still alive when the alleged unlawful means are employed to produce the miscarriage or abortion.
2. When, in the trial of an indictment founded upon this section, one of the main defenses was that the child was not in fact living at the time the alleged offense was committed, and the evidence bearing on this question was so conflicting as to make it a close and doubtful case, the refusal to give in charge to the jury a written request, properly framed, and asking the judge to call the attention of the jury to this specific defense by instructing them that the child must have been in fact alive, or there could be no conviction, is cause for a new trial. This is so, although the court did in general terms charge upon the law relating to this subject. *Thompson v. Thompson*, 77 Ga. 692, 3 S. E. Rep. 261; *Met. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. Rep. 49; *Bell v. State*, 103 Ga. 12, 29 S. E. Rep. 451.
3. There was no error in refusing to give to the jury the other requests to charge, as the principles embraced in such of them as were pertinent to the case were more fully and specifically covered in the general charge than in the requests. There was no error in any of the charges complained of. Some of the exceptions to the admission of evidence do not state what objection was made at the time, and others refer to the brief to show what the objectionable testimony was. These cannot be considered. The evidence of the admission of which complaint is properly made was legally admissible. The grounds of the motion for new trial which complain of the overruling of the demurrer to the indictment cannot be considered, for the overruling of such a demurrer is not ground for new trial. The grounds complaining of the refusal to change the venue, of holding that a juror over sixty years of age was incompetent to try the case, and of refusing to grant a new trial, because of newly discovered evidence, are likewise not considered, as the questions are not likely to arise on the next trial.

(Syllabus by the Court.)

Judgment reversed, all the justices concurring.

W. A. Taylor was convicted in the Superior Court of Douglas County, C. G. Janes, Judge, and appeals. Reversed.

W. T. Roberts, Solicitor General, J. R. Hutcheson, and T. W. Rucker, for the State.

J. S. James, B. G. Griggs, W. A. James, and J. V. Edge, for appellant.

PEOPLE V. ABBOTT.

116 Mich. 263—74 N. W. Rep. 529.

ABORTION: MANSLAUGHTER: *Grades of offense—Variance—Hearsay evidence.*

1. Under the statute, death from an abortion on a woman not quick with child would be manslaughter rather than murder.
2. An act undesignedly resulting in the death of another, not amounting to felony, but *malum in se*, constitutes manslaughter.
3. The fact that the woman consented does not raise a fatal variance, because the information charges "with force and arms."
4. It is hearsay for a physician to testify that he understood that certain money paid him was paid by defendant; and also hearsay are statements of a woman admitted in evidence, not made in the presence of defendant, that she was in the habit of performing such operations.

Error to Hillsdale County; Lane, Judge.

Conviction for manslaughter. Reversed.

Fred A. Maynard, Attorney-General, W. H. Frankhauser, Prosecuting Attorney, and Guy M. Chester, for the People.

Noah P. Loveridge and Corvis M. Barre, for the appellant.

HOOKER, J. The defendant was convicted of manslaughter, as an accessory; before the fact, in causing the death of Viola Stevens through the use of an instrument in an attempt to cause a miscarriage.

To understand the points raised, reference should be had to the statutes relating to the subject. 2 How. Stat., § 9106, provides that the wilful killing of an unborn quick child, by any injury to the mother which would be murder if it resulted in

the mother's death, shall be manslaughter. Section 9107 makes an attempt to destroy an unborn quick child through medicine administered to, or instruments used upon, the mother, manslaughter when followed by the death of the child or mother, unless necessary to preserve the life of the mother, or so advised by two physicians. Section 9108 punishes as a misdemeanor the wilful employment of drugs, etc., or instruments upon a pregnant woman, with intent to procure a miscarriage, subject to the exceptions mentioned in the preceding section. See 2 How. Stat., § 8438; *People v. Olmstead*, 30 Mich. 431. The information contained separate counts for murder and manslaughter, and also a count upon the last mentioned section, viz., 9108. In his charge to the jury the learned circuit judge said that the defendant could not be convicted of murder, and that he could not be convicted of statutory manslaughter under section 9107, because Viola Stevens was not shown to have been pregnant with a quick child, in the sense that such term is used in the law. He instructed them that the defendant might be convicted of a misdemeanor, under section 9108, or that he might be found guilty of manslaughter, upon the theory that death to the mother resulted from the act, which was made unlawful and punishable by section 9108, under the well-established rule that "if a person, whilst doing or attempting to do another act, undesignedly kill a man, if the act intended or attempted were a felony, the killing is murder; if unlawful,—*malum in se*,—but not amounting to a felony, the killing is manslaughter; if lawful—that is, not being *malum in se*,—homicide by misadventure merely." See *People v. Scott*, 6 Mich. 293.

The defendant's counsel take the position that under these statutes there can be no conviction of the offense of murder where death is caused by any of the acts therein made punishable; that there can be no conviction of manslaughter in such cases except when the woman was, at the time of the commission of the act, pregnant with a quick child, as provided in sections 9106, 9107; and that it necessarily follows—the judge having determined and instructed the jury that Viola Stevens was not shown to have been pregnant with a quick child—that the defendant could be convicted, if at all, only of the misdemeanor created by section 9108. This contention rests upon the

proposition that such act was not unlawful at the common law, it being no offense to attempt to produce an abortion upon a woman pregnant, but not with a quick child, with her consent, and upon the theory that the legislature has, by section 9107, shown an intention to reduce the offense from murder to manslaughter in cases where a woman pregnant with quick child comes to her death in this way, and upon the fact of its failure to provide in section 9108 additional punishment where the woman upon whom a miscarriage is sought to be produced dies in consequence thereof, from which it is said that it must be inferred that the intention was to make the penalty prescribed by that section the limit in all cases.

We think this theory should not prevail. If we could say that the law recognizes the lawfulness of attempts to produce miscarriages, there would be more force in the contention that a fatal result to the mother would be excusable homicide, though we do not mean to intimate such an opinion; but the legislature have been to the trouble to make the mere attempt to cause a miscarriage punishable by a year's imprisonment, and we cannot believe that they intended that the death of the mother should be treated as a misadventure. It is more reasonable to believe that they left that subject to be governed by existing rules of law. Upon this theory it was reasonable for the circuit judge to say that the defendant could not be convicted of murder, because that would have been the extent of the offense had the child been quick; and it is not to be supposed that the law would be more severe in a case where the child had not quickened than where it had, even if, under existing rules, the passing of section 9108 would otherwise have made such offense murder. See *Com. v. Railway*, 113 Pa. St. 37. Without deciding this question, however,—it being unnecessary,—we must determine whether the conviction of manslaughter can be upheld. It may be, unless it can be said (1) that at common law a conviction could not be based on accidental killing through an unlawful act less than a felony, or (2) that it cannot be based on an act made unlawful by statute.

Mr. Bishop asserts that "if the act be both wrongful and in its nature dangerous to life, even if it be a misdemeanor, yet, if the element of danger concurs with the element of the un-

lawfulness of the act, the accidental causing of death thereby is murder." 2 Bish. Cr. Law, § 691. See Tiff. Cr. Law, 815. Counsel contend that this is not a dangerous act, basing the contention upon the evidence of physicians, which is said to show that not more than one per cent. of cases are fatal to the woman, where the child has not quickened. We doubt if the effect of this statute is to depend upon the opinions of witnesses upon the question of the degree of danger. But, however that may be, the act was a misdemeanor, and accompanied by some danger to life, and we shall find much authority for holding that an indictment for manslaughter will lie in such a case.

"If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt by wounding or beating him, or in the wilful commission of any unlawful act which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other,—as by committing a riot, robbing a park, etc.,—he shall be adjudged guilty of murder." 1 Hawk. P. C. (Curw. Ed.), p. 86, § 10.

Again, Bishop says: "And if the act were not directly dangerous, yet done with the motive of committing a misdemeanor, the offense will be manslaughter; but if, still not being dangerous, the motive were merely the commission of a civil trespass, the unintended death would not be indictable under all circumstances, though under some it would be manslaughter. To lay down, as to this, an exact rule, sustained by authorities, seems impossible. But, to illustrate, when a man discharges a gun at another's fowls, in mere wanton sport, he commits, if he accidentally kills a human being, the offense of manslaughter, while his intended act is only a civil trespass; and the same is the result when the firing of the gun which produces death is with intent simply to frighten another, or when one carelessly discharges the contents of firearms, into the street. And where a lad in a frolic, without meaning harm to any one, took the trap-stick out of the fore part of a cart, in consequence of which it was upset, and the carman, who was in it, putting in a sack of potatoes, was thrown backward on some stones and killed, the lad was held to be guilty of manslaughter. Where one covers another with straw, and sets fire to it, if the intent is to do a

serious bodily harm, and death follows, the offense is murder; if merely to frighten, it is manslaughter. (*Errington's Case*, 2 Lewin, Crown Cas. 217.) . . . Giving one physic in sport, if it kills him, is manslaughter." 2 Bish. Cr. Law, § 692, note 4; *Id.*, § 693. See *People v. Scott*, 6 Mich. 292.

Thus it appears that the unlawful act need not always be criminal, and, where the act done is not of dangerous tendency, the offense, when death accidentally follows, may be manslaughter. 2 Bish. Cr. Law, §§ 670, 694.

Again Mr. Bishop says: "Though the intent of the wrongdoer is not to take human life, and the thing which he does is not of the dangerous sort contemplated in the last few paragraphs, still, by accident, it may result in death. And if it does, and if the thing intended was *malum in se* and indictable, whether as felony or misdemeanor, a discussion in our first volume shows that a felonious homicide is committed." *Id.*, § 694. See also 1 Bish. Cr. Law, §§ 323-336.

In *Com. v. Parker*, 9 Metc. (Mass.) 265, it was said: "The use of violence upon a woman, with an intent to procure her miscarriage without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law. So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in case of a duel, where, in like manner, there is the consent of the parties."

In this case it was held necessary to aver and prove that the woman was quick with child, and the indictment was held bad. The following language is significant: "There being no averment, in the first count in this indictment, that the woman was quick with the child, or any equivalent averment, and the judge who tried the case having instructed the jury that it was not necessary to prove such averment in the third count, the court are all of the opinion that, although the acts set forth are, in a high degree, offensive to good morals and injurious to society,

yet they are not punishable at common law, and that this indictment cannot be sustained." Id. 268.

From this and the foregoing authorities we may infer that, had the act been a misdemeanor at the common law, it would have supported an indictment for manslaughter. We are not advised of any authority which limits the application of this rule to acts which were misdemeanors at common law, nor do we see any good reason for so limiting it. In *Yundt v. People*, 65 Ill. 374, it was held that manslaughter would lie in a case closely analogous to the one before us.

A further contention is that, granting that the act was indictable, the information would not support a conviction under the proof, in that it alleged that the act was committed with force and violence, while the evidence shows that it was done with the consent of Viola Stevens. It is urged that this was a fatal variance. We are cited to the case of *People v. Olmstead*, 30 Mich. 438, in support of this claim. In that case the information is very brief, and consists of the single statement that respondent, on a day and year and at a place named, "one Mary A. Bowers feloniously, wilfully, and wickedly did kill and slay, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Michigan." There was nothing there to indicate the fact of consent, or even the nature of the act. As the court said: "He might, perhaps, be fairly assumed bound to prepare himself to meet a charge of manslaughter by direct violence or assault." Moreover, that was a statutory charge of manslaughter under section 9107, 2 How. Stat. The information in this case was more specific. It clearly apprised the defendant of the nature of the offense, unless it was necessary to allege Viola Stevens' consent, and to omit the allegation that the act was committed "with force and arms in and upon one Viola Stevens, in the peace of the People of the State of Michigan then and there being," etc. In our opinion this was not a fatal variance, especially as it was not necessary to allege or prove the assent of Viola Stevens to the act, and as the offense was the same whether she assented or not.

We are constrained to say that we think the testimony of Dr. Niblack, wherein he stated that he understood that certain

money paid him by Mr. Shepard was paid upon behalf of Mr. Abbott, was hearsay, and inadmissible. The prosecuting officer urges that this was an adverse witness, but we think that does not justify the introduction of hearsay evidence. We think also that the statements of Mrs. Saunders, who is said to have performed this operation, that she was in the habit of performing them for the purpose of abortion and miscarriage, and her description to the witness of the method adopted, were inadmissible. It was competent to show the character of the act by proving that Mrs. Saunders was engaged in the business of committing abortions. As in the case of *People v. Seaman*, 107 Mich. 348, it was competent to show that others were operated upon for such a purpose by her, as it tended to establish the design with which the operation was performed. This might have been proved by persons cognizant of the fact; but the statements of Mrs. Saunders that she had done these things were but hearsay, though it would have been different had Mrs. Saunders been on trial. In that case they would have had the force of admissions. Here they have not. They were not made in the presence of the defendant, nor do they appear to have been brought to his knowledge, and acted upon.

The judgment is reversed and a new trial ordered.

The other justices concurred.

NOTE (by H. C. G.).—*Information; statutory definition.*—Where a statute, under the general head of "Abortion," provided a penalty for procuring a "miscarriage," etc., and the information used the word "miscarriage," *held*, that it was proper to follow the statute, and that the statute was not in conflict with the constitution in not clearly expressing the subject matter under its title; that the terms are so similar in meaning and in common use, and as defined, as to practically mean the same thing. *State v. Crook*, 16 Utah, 212, 51 Pac. Rep. 1091 (1898).

Plea of former acquittal.—Demurrer was sustained to an information charging an attempt to produce a miscarriage, and defendant discharged, without any order that he be held for further prosecution. Subsequently the defendant was tried under another information, alleging the same offense as in the prior one. *Held*, that the judgment on the demurrer was an acquittal, in the absence of any order of the court directing the defendant to be held subject to another information, or to have the case submitted to the grand jury. *Id.*

Not necessary to save life.—Where the statute creating the offense provides a condition that the abortion was not necessary to save the life of the woman, etc., it is necessary to plead it, and also to show in

the proof that it was not necessary to save life. *State v. Schuerman*, 70 Mo. App. 518.

Verdict not responsive to indictment.—Indictment charged the causing of death by using instruments with intent to produce a miscarriage. The verdict found defendant "guilty of procuring abortion," etc. *Held*, that the verdict was not in accord with the indictment. The statute does not use the word "abortion," but provides a penalty for procuring a "miscarriage." But the defendant was indicted for causing death, not even for procuring a miscarriage, and in either view the verdict was not responsive. *Florien v. State*, 8 Ohio Cir. Dec. 171 (1897).

BONES v. STATE.

117 Ala. 146—23 So. Rep. 485.

Decided April 7, 1898.

ABUSIVE LANGUAGE: *Within hearing of a family.*

Uttering abusive language in hearing of family, need not be in hearing of the entire family; but should be in the hearing of more than one person.

Appeal from the County Court of Bibb County; Hon. N. H. Thompson, Judge.

Lou Bones, being convicted of using abusive language near a dwelling and within the hearing of a family, appeals. Affirmed.

W. S. Cary, for the appellant.

Wm. C. Fitts, Attorney-General, for the State.

McCLELLAN, J. The affidavit charges that the defendant "did enter into or go sufficiently near the dwelling house of James Tarrant, and did make use of abusive or insulting language, within the hearing of the family of James Tarrant." The evidence shows that the defendant did enter into or go sufficiently near said house, and did there make use of abusive or insulting language, within the hearing of the defendant, his wife, and several of his children, but that two of his children were not at home that day. On this state of case, the defendant asked the following charges: "(2) The court further instructs the jury that they should acquit the defendant provided the evi-

dence shows that abusive or insulting language was made use of within the hearing of some, and not all, the members of James Tarrant's family." "(3) The court instructs the jury that it is their duty to acquit the defendant provided the evidence shows that any member of James Tarrant's family did not hear any abusive or insulting language." These charges were severally refused, and the rulings of the court thereon are insisted upon here as erroneous.

The statute (Code 1886, § 4031) under which the prosecution is had provides: "Any person who enters into or goes sufficiently near the dwelling house of another, and in the presence or hearing of the family of the occupant thereof, or any member of his family, uses abusive and insulting language," etc., "must on conviction be fined," etc. And the question is, what is meant by the word "family" in this section? A family, *ex vi termini*, must be more than one person; hence the provision of the statute for the protection of any member of the family. Without such provision it would be no offense to use the interdicted language in the presence of one member of the family. But it by no means follows that, to fill the other provision of the statute, all the members of the occupant's family should be present. There is no room for saying, we think, that the occupant, his wife, and several children did not constitute a family in the sense of the statute, merely because two of his children were not present. To so hold would be a technicality of construction which the words of the statute do not require, and which is essentially repugnant to the manifest purposes of the enactment. In ordinary acceptance, husband, wife, and several children at the time present constitute a family, and, as such, are as much under the protection of the statute as if every member of the family was present. We accordingly hold that the county court properly refused each of said charges, and its judgment must be affirmed. Affirmed.

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STATE v. GIFFORD.

19 Wash. 464—53 Pac. Rep. 709.

Decided June 14, 1898.

ACCESSORY: Pleading.

1. The statute abolishing the distinction between principals and accessories does not alter the rule of pleading that the facts constituting the offense must be set out.
2. An information charging the accused with rape cannot be sustained by proof that he procured another to commit the act.

Appeal from the Superior Court of Spokane County; Hon. Thomas H. Brents, Judge. Reversed.

Del Cary Smith and Fenton & O'Brien, for the appellant.

John A. Pierce, Prosecuting Attorney, for the State.

DUNBAR, J. An information was filed by the prosecuting attorney of Spokane county against the appellant, charging him with the crime of rape. Upon trial of the cause the defendant was found guilty as charged in the information, and was sentenced to the penitentiary for life.

A motion was made to quash the information for the reason that the State was not entitled to prosecute the appellant herein by information. We have decided this question adversely to appellant's contention so often that we decline to enter into its investigation again.

A demurrer was also interposed to the information; appellant contending that it is not direct and certain as regards either the party charged, the crime charged, or the particular circumstances of the crime charged, and that the information did not inform the appellant of the nature and cause of the accusation against him. The material part of the information is as follows:

"Elmer Gifford is hereby charged with a public offense, to wit, the crime of rape, committed as follows, to wit: That on the 7th day of July, A. D. 1897, and within three years next before the filing of this information, at the county of Spokane and State of Washington, the said defendant, Elmer Gifford, then and there in the said county and State being, then and there unlawfully and feloniously did carnally know one Flossie

Fuller, the said Flossie Fuller then and there being a female child under the age of eighteen years, and not the wife of the said Elmer Gifford—contrary to the statute," etc.

We hardly see how the information could have been more definite and certain in regard to the crime charged, or the party charged, or the particular circumstances of the crime charged; and, that being true, we think the information informed the appellant of the nature and cause of the accusation against him, and the demurrer was therefore properly overruled.

The testimony, however, showed that the appellant was an accessory before the fact to the crime of rape. Testimony was introduced to show that he acted as a procurer; that he sent men to the rooms of the prosecuting witness, and aided and abetted them in committing the crime charged upon her. Timely objections were made to the introduction of this testimony; the appellant contending that he had no notice of the actual crime which was proven against him. But the court overruled the objections to the testimony, on the strength of a decision of this court (viz., *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888), the testimony was admitted, and it was upon this character of testimony that the appellant was convicted. It was held by this court in *State v. Duncan*, *supra*,—which was a larceny case,—that, under the statute abrogating the distinction between an accessory before the fact and a principal, it was sufficient to charge the principal offense, and that testimony could be rightfully admitted, under such an indictment, showing that the defendant was an accessory before the fact. Upon more mature consideration, we think that case ought to be overruled; and in any event, it seems that it would be an inconsistent rule to apply to the case at bar. The indictment in this case charges the offense of rape. Not only that, but it sets forth how the crime was committed, viz., by having carnal knowledge of Flossie Fuller. The constitution, in section 22 of article 1, which is the declaration of rights, provides that in criminal prosecutions the accused shall have a right to demand the nature and cause of the accusation against him. Surely, in this case, and under the direct language of this indictment, the appellant was not informed of the nature or cause of the accusation against him as it was developed at the trial. Our code provides that the

act or omission charged as the crime must be clearly and distinctly set forth, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. In other words, the law provides for a statement of facts. If the requirements of the law are that the indictment must be direct and certain as regards the particular circumstances of the crime charged, then it certainly must follow that the proof must correspond with the allegations of the indictment; for it cannot be said that the indictment in this case furnished the defendant with any notice that proof would be offered charging him with procuring others to commit the crime of rape upon this prosecuting witness, and it is not the policy of the law to compel persons charged with a crime to enter upon their defense without knowledge of the character of proof which they will be compelled to meet. This man was charged with committing the crime of rape upon this girl by having carnal knowledge of her. That was the act which presumably he would rely upon the State's proving, and a defense of this action would be what a man of ordinary understanding would think it his duty to make. Suppose that, when this information was served upon the appellant, he was innocent of the crime charged, and also innocent of being an accessory before the fact; the crime having been alleged to have been committed in Spokane, he would feel assured that he could prove an *alibi* by proving that he was at that time in Seattle, or some other distant place. Certainly he would feel secure in resting upon such proof, and would have no notice whatever that he was to prepare for a defense for the crime of procuring. Again, showing how ridiculous the application of the rule contended for by the State would be to a case of this kind, suppose a woman should be charged with the crime of committing rape upon another woman, in the language and with the particularity with which the crime is charged in this information. The information would certainly be subject to a demurrer, for it would show on its face a physical impossibility. It is true that § 1189 of the Code of Procedure (Bal. Code, § 6782) provides that—

“No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all degrees concerned in the commission of an

offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet its commission, though not present, shall hereafter be indicted, tried and punished as principals."

But we think that this provision of the law must be construed in connection with the provision of the constitution just above quoted, and the other provisions in relation to the qualifications of an indictment which we have before pointed out, and that the object of this statute was to do away with some of the technical hindrances which before existed in relation to the trials of accessories, and that it was the intention, under this statute, that the defendant might be indicted and tried even though the principal had been acquitted, and to make an accessory before the fact the same as a principal, so far as the punishment was concerned, and so far as the mode, manner and time of trial were concerned. But we do not think it was the intention of the legislature, in the passage of this law, to set a trap for the feet of defendants. The defendant enters upon the trial with the presumption of innocence in his favor, and if he were called upon to blindly defend against a crime of which he had no notice, and which, we think, would be the result of the strict construction of this law contended for, the law itself would be unconstitutional; and any departure from the plain provision of the code, which provides, in substance, for a statement of facts in the indictment, endangers the liberty of the subject. The accused may be indicted, and must be, under the provisions of this law, as a principal, but the acts constituting the offense must be set forth. For instance, in this case the indictment would have charged the appellant with the crime of rape, "committed as follows: By procuring," etc., instead of by alleging another and entirely different state of facts.

The conclusion which we have reached, viz., that there was a fatal variance between the allegations and the proof, renders unnecessary a discussion of the other errors alleged.

The judgment will be reversed.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ., concur.

STATE v. MORGAN.

21 Wash. 355—58 Pac. Rep. 215.

Decided July 15, 1899.

ACCESSORY: *Pleading—Variance.*

1. The statute abolishing the distinction between principals and accessories does not change the rule of pleading that the facts constituting the offense must be set out.
2. A charge, simply of burglary, cannot be sustained by proof that the accused was an accessory before the fact.

Appeal from the Superior Court of Walla Walla County;
Hon. Thomas H. Brents, Judge. Reversed.

Edgar Lemman, for the appellant.

F. B. Sharpstein, Prosecuting Attorney, and *C. M. Rader*,
for the State.

PER CURIAM. Appellant and two others, Elworth and Sims, were jointly charged with the crime of burglary, committed in Walla Walla on March 27, 1898. The information charged the facts as follows:

"The said John Elworth, James H. Sims and James Percy Morgan on the 27th day of March, 1898, in the county of Walla Walla aforesaid, then and there being in the night-time of said day, a certain house then and there . . . the dwelling-house of said Mrs. N. E. Koontz, did wilfully, unlawfully, feloniously and burglariously break and enter with intent then and there the personal goods and property . . . wilfully, unlawfully, feloniously and burglariously to steal, take and carry away," etc.

The appellant had a separate trial. There was testimony tending to show that appellant came to Walla Walla in company with the other two charged in the indictment, and that he and Sims occupied a room together at a lodging house, and that some time after the commission of the burglary Sims was at appellant's room. The defendant was also found to have burglar's tools in his possession. Sims was duly tried and convicted of the burglary committed.

There was no testimony tending to show that appellant was

present when the crime was committed. The most that counsel for the State urge is that appellant was properly charged as a principal, under § 6782, Bal. Code, where the distinction between an accessory before the fact and a principal, and between principals in the first and second degrees, is abolished, and that all persons concerned in the commission of the offense, whether they directly counseled the act constituting the offense or counseled, aided and abetted its commission, though not present, shall be indicted, tried, and punished as principals. The superior court instructed the jury:

"Therefore, if this defendant was either present aiding, abetting, encouraging, assisting, or was absent and by counsel or understanding between himself and the person or persons who did make the entry and breaking . . . then the act of any person with whom he may have conspired to commit the offense would be his act as much as if he had done it in his own person. But you must be satisfied beyond a reasonable doubt that he was in some way implicated or had some connection with those who did commit it, in order to convict him of the offense charged."

It will thus be observed that the defendant, under the instruction of the court, could be convicted of breaking and entering a house if he was in some way implicated or had some connection with those who did break into and enter the house. Section 6842, Bal. Code, provides: "The indictment must be direct and certain, as it regards the particular circumstances of the crime charged."

It would seem that the facts charged as constituting the crime of the defendant in the information were not the facts shown at the trial, and upon which his conviction is demanded, but the variance is fatal. The case at bar seems to fall directly within the rule announced in the case of *State v. Gifford*, 19 Wash. 464, 53 Pac. Rep. 709, and upon its authority the judgment of the superior court is reversed.

OERTER v. STATE.

57 Neb. 135—77 N. W. Rep. 367.

Decided December 8, 1898.

ACCESSORY: *Not to be charged as principal.*

1. The effect of section 1 of the Criminal Code is to make the aiding, abetting, or procuring of another to commit a felony a substantive and independent crime.
2. On an information charging one, as principal, with having committed a felony, the prisoner cannot be convicted as an accessory.
3. The prisoner was indicted for setting up and keeping gaming tables and gambling devices. The district court instructed the jury that if they found that he set up or kept the gaming tables and devices, or "aided and abetted another so to do," they should find him guilty. *Held* erroneous.
(Syllabus by the Court.)

Error to the District Court of Douglas County; Hon. W. W. Slabaugh, Judge.

Henry Oerter, being convicted of keeping gaming tables, brings error. Reversed.

I. J. Dunn, for plaintiff in error.

C. J. Smyth, Attorney-General, and *Ed. P. Smith*, Deputy Attorney-General, for the State.

RAGAN, C. In the district court of Douglas county, Henry Oerter was convicted of the crime of having set up and kept for gain certain gaming tables and gambling devices, contrary to the provisions of section 215 of the Criminal Code. He brings the judgment pronounced upon that conviction here for review.

Of the errors assigned, we notice only one. On the trial the district court instructed the jury: "The material allegations in the information, which the State must prove beyond a reasonable doubt before you will be justified in returning a verdict against the defendant, are that . . . the defendant, Henry Oerter, either alone, or knowingly aiding, assisting, or abetting another, did unlawfully and feloniously set up, or did unlawfully and feloniously keep, for the purpose of gain, certain gaming tables and gambling devices named in the information. If you believe that the State has proved the above material allegations as above

stated, beyond a reasonable doubt, then and in such case you should find the defendant guilty of the crime charged." Section 1 of our Criminal Code provides that any person who shall aid, abet, or procure any other person to commit a felony shall, on conviction thereof, be punished in the same manner and to the same extent as the person who actually committed the felony could be punished. The effect of this legislation is to make the aiding, abetting, or procuring of another to commit a felony a substantive and independent crime. The plaintiff in error was not charged as an accessory before the fact, but as principal. He was not charged in the indictment with aiding and abetting another to set up or keep gaming tables or gambling devices, but with having committed that crime himself. By the instruction just quoted the court, in effect, told the jury that, if the evidence warranted, they might find the plaintiff in error guilty of aiding and abetting another to commit the crime for which the prisoner stood indicted. This was error. The prisoner was indicted for one crime. He could not be lawfully convicted of another and different crime, for which he was not indicted. *Hill v. State*, 42 Neb. 503; *Dixon v. State*, 46 Neb. 298; *Walrath v. State*, 8 Neb. 80; *Noland v. State*, 19 Ohio, 131.

The judgment of the district court is reversed.

MOORE V. STATE.

40 Texas Crim. Rep. 389—51 S. W. Rep. 1108.

Decided April 19, 1899.

ACCESSORY: Discharge of accessory on death of principal—Statute.

Under article 90 of the Penal Code of Texas, if both principal and accessory are arrested, and the principal dies before trial, the accessory must be discharged. This is in harmony with the common law.

(Brooks, J., dissenting.)

Appeal from the District Court of Dallas County; Hon. Charles F. Clint, Judge.

Jack Moore, being convicted of murder, appeals. Reversed.

W. T. Henry, for the appellant.

Robt. A. John, Assistant Attorney-General, for the State.

HENDERSON, J. Appellant was convicted of being an accessory to murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

Appellant assigns a number of errors; but, according to the view we take of the case, there is but one assignment that requires notice. The indictment contained a number of counts,—one charging appellant as a principal, one charging him with being an accomplice, and one charging him with being an accessory. He was tried and convicted under the count which charged the murder to have been committed by E. L. Cady and Lou Moore, and which charged him with being an accessory to the murder so committed by said principals; that is, it charged him with knowing that the said Cady and Moore had committed said offense, and that thereafter he wilfully concealed and gave other aid to the said Cady and Moore, in order that they might evade an arrest for said offense. Appellant filed a motion in the nature of a motion to quash, and a plea in abatement to said indictment, setting up the following facts, to wit: That Lou Moore was his brother, and that therefore, under the statute, he could not be an accessory as to him; and that E. L. Cady was dead, having died before he was ever tried for this offense, and before the presentation of any indictment against him. The facts set up were admitted by the State to be true, but the plea and motion to quash were overruled by the court, to which appellant excepted, which appears by his first bill of exceptions. By his bill of exceptions No. 7, appellant further objected to all testimony in regard to the guilt of said principals, on the grounds as stated in his former bill. This was also overruled by the court. By his bill No. 18, appellant asked the following instruction: "You are instructed that, the State having admitted that the defendant Jack Moore is a full brother to Lou Moore, with whom he is charged in the indictment with being an accessory, and that E. L. Cady, the principal charged in the indictment, died while under arrest upon the charge of murder of Addison Pate, and before the presentation of the indictment against this defendant, and the State having elected to submit this case upon the fourth count of the indictment, charging this defendant with being an accessory to Lou Moore and E. L. Cady in the murder of Addison Pate, you will find the defendant not

guilty, and so return your verdict." This was refused by the court, and appellant reserved his bill of exceptions. So it would appear that appellant has thoroughly and completely saved the question as to his being an accessory under the facts of this case.

Article 89 of the Penal Code provides "that the accomplice may be arrested and tried and punished before the conviction of the principal offender, and the acquittal of the principal shall not bar a prosecution against the accomplice," etc. Article 90 provides "that the accessory may in like manner be tried and punished before the principal, when the latter has escaped; but if the principal is arrested he shall be first tried, and if acquitted, the accessory shall be discharged." Article 87 provides, among other things, that the brother or sister of the principal offender cannot be an accessory to him. This last-mentioned article effectually disposes of the prosecution of this defendant as an accessory to his brother, Lou Moore. As to E. L. Cady, the other principal, the record shows that he is dead; that he died after his arrest on this charge, and before any indictment found against him. This identical question came before the Supreme Court of this State in *State v. McDaniel*, 41 Tex. 229, article 90 was construed, and it was there held that the escape of the principal was the only contingency that authorized the prosecution and conviction of an accessory without, in the first instance, the trial and conviction of his principal. We think the reasoning in said case sound, and not only properly construes our statute on the subject, but is in harmony with the common-law decisions and the courts of other States. *Kingsbury v. State* (Tex. Cr. App.), 39 S. W. Rep. 365; 1 Whart. Cr. Law, §§ 237 to 244, inclusive; *Edwards v. State*, 80 Ga. 127, 4 S. E. Rep. 268; *Ray v. State*, 13 Neb. 55, 13 N. W. Rep. 2; *Holmes v. Com.*, 1 Casey, 222; *Starin v. People*, 45 N. Y. 333.

As stated before, it is not necessary to discuss other questions, for the record discloses a number of errors committed during the trial, as the views above expressed effectually dispose of this case. The judgment is accordingly reversed, and the cause remanded.

BROOKS, J., dissents.

WOOD v. STATE.

Texas Court of Crim. App.—51 S. W. Rep. 235.

Decided May 10, 1899.

ADULTERY: *Indictment—Variance.*

1. The language "one thousand eight hundred and nine seven," in an indictment, will be considered to mean 1897.
2. An indictment charging adultery "without living together," is not sustained by proof of the act by persons *living together*.

Appeal from the County Court of Floyd.

Appellant, convicted of adultery, appeals.

J. W. Pruitt, for the appellant.

Robt. A. John, Assistant Attorney-General, for the State.

BROOKS, J. Appellant was convicted of adultery, and her punishment assessed at a fine of \$100, and she appeals.

A motion was made to quash the indictment on the ground that it alleges the date of the commission of the offense as "one thousand eight hundred and nine seven," instead of what was probably intended as "one thousand eight hundred and ninety-seven." We think this is not sufficient. *Somerville v. State*, 6 Tex. App. 438; *Thomas v. State*, 2 Tex. App. 294; *Witten v. State*, 4 Tex. App. 70; *Hutto v. State*, 7 Tex. App. 44; *State v. Earp*, 41 Tex. 487; *State v. Williamson*, 43 Tex. 502.

We notice, however, that the indictment is for adultery by habitual carnal intercourse, "without living together." The evidence shows conclusively carnal intercourse by the parties, living together. The allegation and proof on this question must correspond. It does not do so in this case; hence we are constrained to reverse the judgment. *Powell v. State*, 12 Tex. App. 239; *Randle v. State*, id. 250; *Burns v. State*, id. 394; *Ledbetter v. State*, 21 Tex. App. 344, 17 S. W. Rep. 427; *Bird v. State*, 27 Tex. App. 636, 11 S. W. Rep. 641. Our able assistant attorney general confesses error upon this question. The judgment is reversed, and the cause dismissed.

NOTE.—*Statute in Georgia*.—Defendant was indicted for committing adultery with a "married woman." The statute refers to "adultery, or for fornication, or adultery and fornication." He was found guilty generally, but it appeared from the evidence that he was a "married

man," but that the woman was unmarried. This conviction was reversed on the ground that the statute recognizes three grades of offenses; that while a married man might be guilty of *adultery and fornication* with an unmarried woman, under the statute he would not be guilty of *simply adultery*, this being the offense when both are married. *Kendrick v. State*, 100 Ga. 360, 28 S. E. Rep. 120.

A letter as evidence.—Defendant was on trial for adultery; it was held proper to receive in evidence a letter written to him by the woman with whom the offense was charged to have been committed, the letter having been received and read by him, for the purpose of showing the disposition of the parties toward each other. *State v. Butts*, 107 Iowa, 653 (1899).

Where the statute provided that prosecutions for adultery could only be brought by the husband or wife aggrieved, and where the woman with whom the alleged offense was committed and her husband separated, and were divorced subsequent to the alleged offense, and again were remarried, after which the husband secured the indictment of the defendant, it was urged by the defendant that by the decree of divorce the prosecutor ceased to be the husband of the woman in question, and that all of his rights as husband thereby lapsed, among them the right to institute the prosecution, and that the remarriage should be regarded as a totally new marriage, and that he stood in the same relation as though he was for a first time marrying the woman subsequent to such conduct. There was much force in this contention, but the court decided otherwise, holding that the term "husband or wife" referred to the relation existing at the time of the offense rather than to the time when complaint was made. *State v. Smith*, 108 Iowa, 440, 78 N. W. Rep. 687 (1899).

STATE V. WATSON.

20 R. I. 354—39 Atl. Rep. 193.

Decided January 12, 1898.

ADULTERY: Indictment—Pleading—Former conviction—Effect of vacating a decree of divorce.

1. One obtaining a divorce and then marrying another person may be convicted of adultery, if the new relations are continued after the decree has been set aside.
2. Defendant should plead to the jurisdiction before he pleads not guilty.
3. A former conviction with partial punishment for bigamy under a defective indictment is no bar to an indictment for adultery. Also the offenses are distinct and separate.
4. Motions to quash are addressed to the discretion of the court.
5. Matters outside of the record should be set up by plea instead of by motion to quash.
6. It is not essential in an indictment for adultery that the *particeps criminis* should be included.

Francis C. Watson, convicted of adultery, petitions for a new trial, etc. Denied.

The Attorney-General, for the State.

J. E. Dennison and *G. R. McKenna*, for the defendant.

TILLINGHAST, J. The defendant, who has been convicted of the crime of adultery with one Mary A. Watson, now petitions for a new trial on numerous grounds, the substance of which, so far as we are able to understand them from the confused statement thereof, is that the verdict is against the evidence, and that the court erred in certain rulings which will be hereinafter mentioned.

The uncontradicted testimony offered by the State shows that the defendant lived with the said Mary A. Watson as his wife for nearly six years, during two of which he lived with her in Hopkinton, in this State, and that he had three children by her. While the defendant does not attempt to deny that he lived with said Mary as his wife, yet he contends, and sets up as a defense to the indictment, that such cohabitation was not adulterous, because, as he alleges, he had obtained a divorce from his former wife, and that he was lawfully married to said Mary at that time; and the vital question, therefore, is as to the validity of said divorce. The facts are these: In 1870 the defendant was lawfully married to Melinda Buddington, in the State of Connecticut. On the 21st day of May, 1889, the superior court of Windham county, Conn., upon a petition filed by him, granted a decree divorcing him from his said wife. On the 23d day of May, 1889, two days after the said decree was granted, the defendant married said Mary A. Watson, in Sterling, Conn., and subsequently lived with her as his wife, as aforesaid. Shortly after said divorce was granted, the respondent therein filed a petition in said superior court, asking that said decree be set aside, and the case re-entered upon the docket, which motion, after notice and hearing, was on the 18th day of June, 1889, granted, the court finding that the respondent therein was prejudiced by the decree; that she had a good defense to the action, and was prevented, by mistake and accident, from appearing to oppose the same. The court also found that said respondent had employed counsel to oppose the granting of the petition for divorce,

and that her counsel had actually appeared to defend the suit, but had not entered his appearance upon the docket; and also that the petitioner knew that the respondent had so appeared. In view of these facts, the court (Douglas, J.) charged the jury in the case at bar that said Melinda Watson continued to be the wife of this defendant from the time of said first-mentioned marriage, in 1870, except, at most, during the interval from the 21st of May, 1889, to the 18th of June, 1889; and that what the relations of the parties were under the law of Connecticut during the term at which the decree of divorce was entered it was not necessary for the jury to consider, as it did not affect the case.

The defendant's counsel requested the court to charge as follows: (1) "That a man who in good faith marries a woman when he was divorced from his former wife, and the divorce was believed by both of them (parties to the second marriage) to be valid and conclusive, he cannot be convicted of adultery with her (second wife) if neither he nor she were married persons, but single, at the time of their marriage to each other, unless they had been divorced from each other since their marriage, and before the alleged adultery." (2) "After a divorce from a former wife, a man does not, by cohabiting as man and wife under his second marriage, or by having carnal knowledge of the body of his second wife, commit the crime of adultery. But the indictment should allege the second marriage, and all the other facts constituting bigamous cohabitation, if the second marriage took place in another State; and, if the jury find these facts to be true, there is a variance between the evidence and the pleadings, and verdict should be 'Not guilty.'" In reply to these requests the court said: "I understand the first request to apply in this way: That if, during the time that the decree of divorce was in force,—that is to say, from May 21, 1889, to the 18th of June, 1889,—that on the 23d of May, when the ceremony of marriage was gone through, these parties were not living in adultery." "The second is that, after the divorce from the former wife, the man does not, by cohabiting as man and wife under his second marriage, or by having carnal knowledge of the body of his second wife, commit the crime of adultery. That I refuse." We do not see that the defendant has any ground to

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complain of this instruction. After the decree of divorce was set aside in manner aforesaid, it is clear that the first-mentioned marriage was in full force; and therefore the defendant was a married man and had a wife living at the time of the commission of the alleged crime of adultery, if, indeed, such was not the case at the date of his second marriage.

It is evident, from an inspection of the record of the divorce proceedings, that the Connecticut court was imposed upon and deceived by the defendant in connection with the granting of said decree,—in short, that the decree was obtained by fraud; and, upon this fact being shown by the respondent in that case, said court promptly righted the wrong thus perpetrated, and placed the parties to the suit where they were before. That, as a general proposition, courts have power to set aside, vacate, modify, or amend their judgments for good cause, no one will question; such power being inherent in the court, as a part of its necessary machinery for the due administration of justice. And whenever a judgment is obtained by the fraud of the party in whose favor it is rendered, and the other party is not implicated therein, of course this constitutes a good and sufficient cause for vacating the judgment. Decrees in divorce suits are not exempted from the operation of this rule, although courts are more reluctant to disturb a decree of divorce, especially after a second marriage involving the interest of third persons. A full discussion of the general question involved may be found in the cases cited in 2 Bish. Mar., Div. & Sep., § 1552, note 3; also, 1 Black, Judgm., § 320. In *Bradstreet v. Insurance Co.*, 3 Sumn. 604, Story, J., says: "I know of no case where fraud, if established by competent proofs, is not sufficient to overthrow any judgment or decree, however solemn may be its form and promulgation." In *Adams v. Adams*, 51 N. H. 388, which is a leading case upon the subject under consideration, Bellows, C. J., says: "This doctrine in regard to impeaching judgments and decrees for fraud has been applied in numerous cases to decrees in divorce suits and suits for nullity of marriage, and the weight of authority is greatly in favor of such application. Upon principle, there is no solid ground for any distinction between decrees in divorce suits and other judgments; or, if there be any, it is to be found in the much greater danger of fraud

and imposition in divorce cases, as compared with others; thus adding largely to the necessity and importance of preserving the power to correct or vacate decrees that have been obtained by fraud and imposition. Accordingly, it is laid down in Bish. Mar., Div. & Sep., § 699, that if a tribunal has been imposed upon, and in consequence of the fraud a judgment of divorce has been wrongfully rendered, it may vacate the judgment, when, upon a summary proceeding, it is made cognizant of the fraud." To the same effect are *Edson v. Edson*, 108 Mass. 590; *Bomsta v. Johnson*, 38 Minn. 230; and *Wisdom v. Wisdom*, 24 Neb. 551. It is clear, then, that, whatever the status of the defendant was between the time of the granting of said decree of divorce and the annulment thereof, yet the said Melinda Watson was his lawful wife during the time covered by the indictment in this case.

The next error alleged to have been committed by the presiding justice is that he overruled the defendant's plea to the jurisdiction of the court. The record shows that on March 23, 1896, the defendant was arraigned and pleaded "Not guilty;" and that on May 19, 1896, without having asked or obtained permission to retract this plea, and without permission to file any further plea, he filed a plea to the jurisdiction, as he styles it (although in fact it is a plea of *autrefois convict*, which is a plea in bar), in which he sets up former jeopardy and former punishment for the same or a kindred offense. On June 8, 1896, the defendant also filed a motion to dismiss the indictment for want of jurisdiction, on the ground of former jeopardy. On June 10th he filed what he denominates as a "Motion to quash, in the nature of a substantial demurrer," on the ground that the indictment charges no offense known to the law, and for various other reasons not appearing of record. On the same day he made a motion for leave to withdraw his plea of "Not guilty," which was denied by the court, whereupon the trial of the case proceeded, and the jury found the defendant guilty.

First, then, as to said plea to the jurisdiction. This plea was filed too late. The rules of criminal pleading require that a plea to the jurisdiction, like a demurrer, plea in abatement, plea in bar, or any other special plea whatever, shall precede the plea of not guilty. If the special plea is determined against the de-

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fendant, the practice is to then allow him to plead over. *State v. Edgerton*, 12 R. I. 108. Moreover, after a plea of not guilty, the defendant cannot file any other plea without leave of court. *Com. v. Blake*, 12 Allen, 188; *Com. v. Lannan*, 13 Allen, 563. We have, however, examined said plea to the jurisdiction, but do not find that it would have been of any avail if it had been filed in season. It sets out, or attempts to set out, a former conviction of the defendant for bigamous cohabitation with the said Mary A. Watson, the indictment in which case covers and includes the same time on which the offense is laid in the one before us. It also sets out that the defendant was imprisoned for six months and ten days for said offense, and he refers to the record of said case in support of his allegation. As that case was before this division on *habeas corpus*, we can properly take notice of the facts therein, and they are these: The defendant was convicted of bigamous cohabitation with said Mary A. Watson, as alleged in the plea, and was sentenced therefor to imprisonment for the term of four years. Some time after he was committed, he obtained a writ of *habeas corpus*, on the ground that the indictment stated no offense known to the law; and, after hearing thereof, this court decided that the indictment was fatally defective, and ordered the defendant discharged from imprisonment. See *In re Watson, Pet'r*, 19 R. I. 342. It will at once be seen, therefore, that said "Plea to the jurisdiction," so called, is without any force or validity. The indictment on which he was tried, convicted, and sentenced was not only for another and distinct offense from that with which he is charged in the indictment now before us, but, by reason of being fatally defective in the manner aforesaid, was a mere nullity. "Where there is no jurisdiction," as said by Mr. Wharton in his work on Criminal Pl. and Pr. (9th Ed.), § 507, "or where the indictment is defective, even in a capital case, it is agreed on all sides the defendant has never been in jeopardy, and consequently, if judgment be arrested, a new indictment can be preferred, and a new trial instituted, without violation of the constitutional limitation. Even partial endurance of punishment under a defective indictment will be no bar when the proceedings are reversed on the defendant's motion, although it is otherwise when judgment is unreversed. But a judgment er-

roneously arrested on a good indictment may be a bar." See also *Kohlheimer v. State*, 39 Miss. 548, cited by counsel for defendant. Moreover, a plea of *autrefois convict* must allege that the two offenses are the same; for when the offenses charged in the two indictments are distinct, though committed concurrently, they are separately prosecutable. Thus, the fact that a person has been convicted of keeping a drinking house and tipling shop is no bar to an indictment for presuming to be a common seller, although both indictments cover the same period of time, and are supported by the same acts of illegal sale. *State v. Inness*, 53 Me. 536. Blackstone says that the pleas of former acquittal or former conviction must be upon a prosecution for the identical act and crime. 4 Bl. Comm. 336. And Chief Justice Shaw says that, in considering the identity of the offense, it must appear by the plea that the offenses charged in both cases are the same in law as well as in fact, and that the plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. *Com. v. Reby*, 12 Pick. 496; *Rice*, Cr. Ev., § 385, and cases cited; *Com. v. Putnam*, 1 Pick. 136, at page 140.

As to the defendant's motion to dismiss, it is sufficient to say that it is based upon the same ground as the plea which we have just passed upon, and hence requires no further consideration.

The defendant's "Motion to quash, in the nature of a substantial demurrer," was properly overruled. A motion to quash an indictment or other criminal process is addressed to the discretion of the trial court, and, as said by Ames, C. J., in *State v. McCarthy*, 4 R. I. 84, "is never granted unless by this short dealing the ends of justice can be as well attained, and the rights and equities of the parties as well observed as by allowing the cause to go on to its termination in the accustomed mode." See also Chit. Cr. Law, 300-303. We have, however, examined the indictment in the case at bar, and find that it is in the ordinary form, and clearly and technically sets out and charges the crime of adultery.

As to that part of the motion which sets up matters *dehors* the record, we reply that, in the first place, it sets out no ground of defense, and, in the second place, even if it did, the matter

should have been set up by plea and not by motion to quash, as the latter can be granted only for defects apparent on the record. *Howland v. School Dist.*, 15 R. I. 184. See also *State v. Drury*, 13 R. I. 540; *State v. Maloney*, 12 R. I. 251; Whart. Cr. Pl. & Prac., §§ 386-88.

The only remaining motion to be considered in this case is that in arrest of judgment, which is merely a rehash of the defendant's "Plea to the jurisdiction," so called, and of his subsequent motions which we have already considered. The motion is coupled with an argument to the effect that the defendant, if indictable at all, should have been indicted for some other offense than that of adultery, and also that one of the guilty parties cannot be indicted without the other. It would not seem to require a very thorough knowledge of criminal pleadings in order for counsel to avoid mistakes of this sort, as well as those hereinbefore pointed out. The motion in arrest of judgment is overruled.

We have examined the numerous other grounds contained in the defendant's petition for new trial, but do not find that they are entitled to any serious consideration. Petition denied, and case remitted to the Common Pleas Division for sentence.

PEOPLE v. ROBERTS.

122 Cal. 377—55 Pac. Rep. 137.

Decided November 19, 1898.

ALIBI: *Instruction assuming a fact as proven—Examination of witnesses.*

1. It devolves upon the People to prove beyond all reasonable doubt that the accused is guilty as charged, and no burden rests on him to prove an *alibi*.
2. It is reversible error for the court, in instructing the jury, to assume that it was "proven that the crime was committed."
3. Overruling objections to questions that go more to form than substance is not reversible error, if no injustice is done.

Appeal from the Superior Court of Lassen County; Hon. F. A. Kelly, Judge.

Appellants, being convicted of grand larceny, appeal. Reversed.

Goodwin & Goodwin and *W. M. Boardman*, for the appellants.

W. F. Fitzgerald, Attorney-General, for the People.

GAROUTTE, J. Defendants have been convicted of the crime of grand larceny, and appeal from the judgment and order denying their motion for a new trial. They introduced evidence tending to establish an *alibi*, and, as bearing upon this branch of the case, the court gave the jury the following instruction: "You are instructed that if the defendant, or the defendants, was at some other place at the time it is alleged or proven that the crime was committed, it is what, in law, is called an '*alibi*.' When satisfactorily proven, it is a good defense in law. Whether or not an *alibi* was proven and established to your satisfaction in this case is a fact for you to decide from all the evidence introduced before you; and if you believe that the defendants, or either of them, was not present at the time it was alleged or proven that the crime was committed, and therefore could not have committed the crime charged in the information, and did not aid or abet in its commission, then you should find him or them not guilty." The foregoing instruction is attacked by defendants. It is first claimed that the instruction is erroneous in assuming as a fact that the larceny was proven. Under the constitution of the State, a judge may state to the jury what the evidence introduced at the trial is, but the power there granted gives him no right to declare, as a matter of law, that certain facts are established by the evidence. It follows that the contention of defendants in this regard is well founded. But the most serious objection to the instruction is presented in the fact that it assumes throughout that an *alibi* is a matter of defense, and the jury are told that it must be established to their satisfaction. When a jury is told that any particular fact must be established to their satisfaction, such statement can only mean that such fact must be established at least by a preponderance of evidence; yet there is no such burden cast upon a defendant charged with a crime, except in certain particular instances, which are in no sense presented here. It is for the People to make a case against the defendant beyond a reasonable doubt, and the element of *alibi* is included in the case which the law

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demands the People to make out, equally with all other parts of it. If the evidence offered by defendants tended to establish an *alibi* to the extent that it was sufficient to raise a reasonable doubt in the minds of the jurors as to defendants' guilt, then those defendants should have been acquitted. It is thus apparent that the *alibi*, to be efficacious to a defendant, need not be "satisfactorily proven," and need not be established to the satisfaction of the jury.

It is next insisted that error was committed in allowing certain questions to be asked of witnesses who were called for impeachment purposes. The evidence of these witnesses bore upon the general reputation for truth, honesty, and integrity of certain witnesses produced by the defendants. The objections here insisted upon go more to form than to substance. There is no rigid, inflexible rule to be followed by counsel in the form of the questions to be addressed to witnesses when testifying to general reputation as bearing upon the question of veracity. And any deviation from the general course to be followed, as marked out by the decisions of this court, will not be held reversible error, unless those deviations have resulted in some injustice to the defendant. In this case we find nothing of the kind.

For the foregoing reasons the judgment and order are reversed, and a new trial ordered.

We concur: HARRISON, J., VAN FLEET, J.

PEOPLE v. FONG AH SING.

64 Cal. 253—28 Pac. Rep. 233.

Decided October 26, 1883.

ALIBI: Dying declarations.

1. Proof of an *alibi* is as much a traverse of the matters charged as is any other defense.
2. A reasonable doubt as to whether the defendant was present at the time and place of the alleged crime is sufficient for an acquittal.
3. It is error in an instruction to say, "If the jury find the defendant to have been at another place," etc., because it infers that the defendant was required to prove his absence.
4. Evidence of dying declarations should be confined to the fact of the homicide, and not extended to prior acts.

Appeal from the Superior Court of San Francisco. Reversed.

L. Quint, for the appellant.

The Attorney-General, for the People.

Ross, J. The defendant was charged with the crime of murder. His defense was that of *alibi*, he claiming that at the time the deceased was killed he (defendant) was at certain rooms about three blocks distant from where the murder was committed. Upon that question the evidence was conflicting, and upon that state of facts the defendant, through his counsel, requested the court to charge the jury as follows: "Whilst the prosecution must establish beyond a reasonable doubt the guilt of the defendant, it is not incumbent on the defendant to prove an *alibi* beyond a reasonable doubt. Though the evidence offered to establish an *alibi* falls short of the weight of moral certainty as to the existence of the *alibi*, yet if it leave in the minds of the jury such a doubt or uncertainty that, taken by itself, they could not find for or against the *alibi*, they are bound to carry such doubt into the case of the prosecution, and to array it there as an element of the reasonable doubt, beyond which the prosecution must establish guilt. The defendant is entitled as much to the benefit of such doubt as to any other doubt raised by the evidence; and if its weight, alone, or added to that of any other, be sufficient to reduce belief in their minds as to the defendant's guilt to a reasonable doubt, they must acquit." This instruction the court below refused to give, but instead gave the jury, as the law upon the subject of *alibi*, the following: "If the jury find the defendant to have been at another place,—as, for instance, in the society's rooms, which have been spoken of in the evidence at the time of this alleged shooting,—and if his being there then creates a reasonable doubt of his having been present at the place of the alleged crime at the time of its alleged commission, he should have the benefit of that reasonable doubt, and be acquitted." The instruction requested was substantially correct, and should have been given. The charge given was incorrect, and should not have been given. The commission of a criminal offense implies, of course, the presence of the defendant at the necessary time and place. Proof of an *alibi* is, therefore, as much of a traverse of the crime charged as any other defense;

and proof tending to establish it, though not clear, may nevertheless, with the other facts of the case, raise doubt enough to produce an acquittal. A reasonable doubt of the defendant's presence at the time and place necessary for the commission of the crime would seem necessarily to raise a reasonable doubt of his commission of it. But, according to the charge of the court below, the defendant was not to have the benefit of any doubt in regard to the alleged *alibi*, unless the jury should find as a fact that he was at another place than the place of shooting when the shooting occurred. It is obvious that the finding of that fact would itself have established the *alibi*, and that would have ended the case of the prosecution. But proof tending to establish an *alibi*, though insufficient of itself to establish that fact, is not to be excluded from the case. Whatever doubt, if any, such testimony may raise in the minds of the jurors, is for their consideration; and if its weight, alone, or added to that of other evidence in the case, be sufficient to reduce belief in their minds as to the defendant's guilt to a reasonable doubt, they should acquit; for in every criminal case, when all the proof is in, the final question for the jury is, are all the essential averments of the indictment proved beyond a reasonable doubt?

The dying declaration of the deceased was properly admitted in evidence, but the declaration included some matter foreign to an instrument of that nature, and which should have been excluded by the court below from the consideration of the jury. We allude to the following statement of the declarant: "I don't know any reason that Fong Ah Sing had for shooting me, unless it was that a few days before the shooting I was bathing my feet up stairs over a room in which Fong Ah Sing was sitting, and I spilled a little water on the floor, and some of it leaked through the floor and fell upon Fong Ah Sing. Fong Ah Sing was very angry thereat, and told the proprietor of the house that I must apologize, and make him some present, to prevent bad luck coming upon the house. The proprietor did make some little present to Fong Ah Sing, and I supposed the matter was settled." Dying declarations are restricted to the act of killing, and to the circumstances immediately attending it and forming a part of the *res gestæ*. When they relate to former and distinct transactions they do not come within the principle of necessity

on which such declarations are received. Whart. Crim. Ev., § 278; 1 Greenl. Ev., § 156; *State v. Draper*, 65 Mo. 335; *Leiber v. Com.* 9 Bush, 11; *Moses v. State*, 11 Humph. 232; *State v. Shelton*, 2 Jones (N. C.), 360; *Nelson v. State*, 7 Humph. 542; *Hackett v. People*, 54 Barb. 370. Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, SHARPSTEIN, McKEE, MYRICK, and THORNTON, JJ., concurred.

SHOEMAKER V. TERRITORY OF OKLAHOMA.

4 Okl. 118—43 Pac. Rep. 1059.

Decided in 1896.

ALIBI: Instructions regarding burden of proof.

It is reversible error to instruct the jury that the burden is on the defendant to prove an *alibi*, and that such proof must show that defendant could not have been present at the alleged crime.

Appeal from the District Court of Kingfisher County; McAttee, Judge.

Appellant was indicted in Blaine county for murder, and tried upon change of venue in Kingfisher county, was there convicted and sentenced to the penitentiary for life. Reversed.

Buckner & Son, for the appellant.

C. A. Galbraith, Attorney-General, for the appellee.

BIERER, J. The appellant has assigned numerous errors for a reversal of the judgment of the district court, but only two are relied upon by counsel for appellant in their brief, and only one is necessary for our consideration.

On the question of *alibi* the court instructed the jury as follows:

"*Thirty*. The defendant claims as his defense what is known in law as an *alibi*, that is, that, at the time of the murder with which he is charged was being committed, he was at a different place, so that he could not have participated in its commission.

"*Thirty-one.* The burden is upon the defendant to prove this defense for himself, by the preponderance of the evidence, that is, by the greater and superior evidence. The defense of *alibi*, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place so far away, or under such circumstances, that he could not, with all the means of travel within his control, have reached the place where the crime was committed, so as to have participated in the commission thereof.

"*Thirty-two.* The jury is instructed that if they believe that the Territory has made out such a case as, under this instruction herein given, will sustain a verdict of guilty of the crime charged in the indictment, then the burden is upon the defendant to make out his defense of an *alibi*, and, upon all the evidence, then the primary question is, the whole of the evidence being considered, both that given by the defendant and that given for the Territory, Is the defendant guilty beyond a reasonable doubt? The law is that when the jury has considered all the evidence, as well that touching the question of the *alibi* as the criminating evidence introduced by the prosecution, then if they have any reasonable doubt of the guilt of the accused of the offense of which he stands charged, they should acquit; but if they have no such reasonable doubt, then they should not acquit, but should find the defendant guilty."

Exceptions were saved to the giving of instructions thirty-one and thirty-two, and one of the grounds upon which appellant relies for a reversal of the case is the assignment of error committed in giving instruction number thirty-one. We have set out the three instructions, as they all go together, and are the entire instructions of the court on this question.

Instruction thirty-one is erroneous. The general provision of our statute places the burden of proof upon the Territory, and we have no provision which changes or limits this general provision with reference to proving an *alibi*.

Section 5201 provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown he is entitled to be acquitted."

This section is identical in substance with section 228 of the

Criminal Code of Kansas, which was held by the Supreme Court of that State, in the case of *State v. Child*, 40 Kan. 482, "to cast the burden of proof on the State."

And where it is further held: "There is a presumption that elings to a person charged with crime, through every successive step of his trial, that he is innocent, and this presumption is never weakened, relaxed or destroyed, until there is a judgment of conviction. The State is required to prove his guilt beyond any reasonable doubt, and all the defendant has ever been required to do is to produce evidence that creates such a doubt as to entitle him to an acquittal. He is not required to prove his innocence; all that is demanded of him is to show such a state of facts as to create a reasonable doubt of his guilt. This defense of *alibi* is peculiar in this respect so far as this case is concerned, that the State is bound to prove, in making its case, that the defendant was present at the commission of the crime, and this material fact it must prove beyond any reasonable doubt. The defendant alleges he was not present, and he offers evidence to sustain this allegation. The trial court said he must prove it by a preponderance of the evidence, while the general rule of law, outside of the statutory requirement, casts the burden of proving that fact on the State."

The court in that case reversed the judgment because the trial court had given instructions, in not nearly as strong language as that in which the instruction in question is couched, to the effect that the burden of proving an *alibi* is on the defendant to establish the same by a preponderance of the evidence, but directing the jury to acquit the defendant, unless from all the circumstances surrounding the case, they were satisfied of his guilt beyond a reasonable doubt. The offer of evidence by the defendant tending to prove an *alibi* does not change the burden of proof and shift it upon the defendant. And this principle has been vigorously maintained even in the absence of, or at least without reliance upon, such a statute as that of ours referred to. *Walters v. State*, 39 Ohio St. 215; *State v. Chee Gong* (Oreg.), 19 Pac. Rep. 607; *Turner v. Commonwealth* (Pa.), 27 Am. Rep. 683; Greenl. Ev., vol. 1, § 74, note.

In Mr. Greenleaf's note just cited he used this positive language in expressing the rule: "In criminal cases, the weight of

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evidence or burden of proof never shifts upon the defendant, but is upon the government throughout."

In *Wisdom v. People* (Colo.), 17 Pac. Rep. 519, the instruction that, "to render proof of an *alibi* satisfactory, the evidence must cover the whole time of the transaction in question, so as to render it impossible that the defendant setting up such defense could have committed the act," was held reversible error.

In *French v. State*, 12 Ind. 670, reversible error was held to have been committed by giving the instruction: "Evidence which tends to establish the defendant's guilt, also tends, in an equal degree, to prove that he was present at the time and place when and where the deed was committed; and, if he seeks to prove an *alibi*, he must do it by evidence which outweighs that given for the State, tending to fix his presence at the time and place of the crime."

In this case, which is a well considered opinion approved by all the judges, it is held that the rule is nowise different in a case where the defendant sets up an *alibi* from what it is where other affirmative matter is relied on. In the opinion the court says with reference to the instruction given: "This instruction is not in accordance with the general rule of law, as applied either in civil or criminal cases; for in the former, the defendant is not bound to produce evidence which outweighs that of the plaintiff. If he produces evidence which exactly balances it, so as to leave no preponderance, he defeats the suit against him."

In *People v. Fong Ah Sing*, 64 Cal. 253, the court held it erroneous to give an instruction on *alibi* which directed the jury to acquit the defendant if they found him to have been at another place at the time of the commission of the homicide.

The instruction here in question is very much like that in this California case, for it tells the jury that the *alibi*, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place, so far away or under such circumstances that he could not, with all the means of travel within his control, have reached the place where the crime was committed so as to have participated in the commission thereof.

Of course under this instruction the jury could only consider

an *alibi* in case it was shown or proven as a fact, and this was too great an obligation to place upon the defendant in any event. He was not bound to prove the *alibi*. He was not bound to prove that he was at some other place at the time of the commission of the crime, no matter what the evidence of the Territory against him might be. If he offered such evidence as would create in the minds of the jury a reasonable doubt as to his presence at the time of the commission of the crime, his burden was fully borne, and it was the duty of the jury to acquit him, although the evidence so offered might fall very short of proving as a fact, by the greater weight of the evidence, that he was not at the scene of the crime at the time of its commission.

There are some authorities holding the other way on this question; as, for instance, in Iowa, in the case of *State of Iowa v. Hamilton*, 57 Iowa, 596, 11 N. W. Rep. 5, it is held that, where the defense of *alibi* is relied upon, the burden of proof is on the defendant to establish it by a preponderance of the evidence.

But there is in this case a very strong and most able dissent by Adams, C. J., also concurred in by Mr. Justice Day, and in our view of the law the dissenting opinion is much the best law written in that case. It shows, indeed, how absolutely dangerous to liberty is the rule placing the burden of proof on the defendant.

The dissent in this case also cites, with particular approval, the case of *French v. State*, 12 Ind. 670.

Judge Adams and Day also dissent from the Iowa doctrine in the case of *State of Iowa v. Reed*, 17 N. W. Rep. 150.

We think the learned judge who tried the case below was misled into giving this instruction by following the precedents given in Sackett in his work on Instructions, where the doctrine is taken from the Illinois rule. It is true that the rule, as given, is supported by the Illinois decisions. The dangerous departure from the ancient and time-honored rule of presuming the innocence of the defendant and lodging the burden of proof on the prosecution throughout all the stages of the case, could be no more forcibly exhibited than is done by the extraordinary rule finally reached by the Supreme Court of Illinois, as expressed in the syllabus to the case of *Klein v. The People*, 113 Ill. 596,

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which is: "A defendant, to establish an *alibi*, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place."

Such a rule as that has probably landed innocent men in the penitentiary or on the gallows, or else it has been refused enforcement by the juries of the very State that has adopted it.

In the case of *State of Nevada v. Waterman*, 1 Nev. 453, which was cited by the attorney-general, the Supreme Court of that State held it erroneous for the trial court to instruct the jury that, to warrant the acquittal of the defendant on the proof of an *alibi*, they must be satisfied of its truth by the testimony. In that case, although the court said that when the defendant attempts to establish an *alibi* he takes on himself the affirmative of the proof, it also stated that "it is not necessary that he should establish his defense by a preponderance of the evidence." The argument is a strong one against placing the burden, to any extent, upon the defendant, and is, in itself, a refutation of the outward rule therein formed as to placing the burden of proof on the defendant on such an issue.

We must admit that we are unable to understand how the burden of proof could be placed upon a party when he was not required to establish the same by even a preponderance of the evidence. A burden that need not be established by a preponderance of the evidence is, in law, no burden at all, for a preponderance of the evidence is the least degree of proof by which a proposition may be established.

Nor can we consider the celebrated case of *Commonwealth v. Webster*, 5 Cush. 295, as being an authority upon which we should lay down a different doctrine for the administration of the criminal law in this Territory.

The accurate language there used by Mr. Justice Shaw is spoken of in the case of *Nevada v. Waterman*, *supra*, as being a "loose expression."

Judge Beatty, in the *Waterman Case*, says that: "The only thing we find in the books at all tending to support the position

taken by counsel for the State is a loose expression of Chief Justice Shaw, in the charge he gave to the jury in the case of *Commonwealth v. Webster*."

And the language which he thus referred to is as follows: "In the ordinary case of an *alibi*, when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offense, tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of an *alibi* does not outweigh the proof that he was at the place when the offense was committed, it is not sufficient."

This language cannot bear the test of reason, or else it is a mistake to say that the burden of proof is upon the prosecution in a criminal cause. As is said in the first two sentences quoted, the evidence tending to prove a crime by the direct act of a party charged is divided into two primary facts. The one that he did the act which constituted the crime; the other that he was there when he did it. Of course these two propositions must be established, and must both be proved as against some one party, or there could be no crime committed, for no person could do the criminal act by which the crime was committed when such person was not present when he did it. And why should a person be required to sustain the burden of proof upon his claim as a defense that he was not present at the place where the prosecution put him, unless he was also required to sustain the burden of proof that he did not do it, that is, that he was not the person who did the criminal act charged and relied upon by the prosecution? The one fact is just as necessarily a part of the proof, and is just as much undertaken to be established by the prosecution, as the other, and if either is wanting, the prosecution must fall and the accused go free.

Suppose the prosecution relies for the conviction of the defendant of murder on proof, however strong and positive it may be, that the defendant at the particular time and place shot and killed the deceased. The two primary facts are that a person at the time and place stated shot the deceased, and that that person was the defendant. Now no person would contend that the burden of proof was on the defendant to show that the deceased was not shot by some one, but, in fact, came to his death some

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other way. Nor would they contend that the burden of proof was on the defendant to show that he was not the person who did the shooting. It will be admitted by every one that these two facts must be established by the prosecution. Now the defendant is not precluded by the testimony of the prosecution, and he is not required to meet it by any particular form of proof. He may desire to meet it in the only way that many a person who is the victim of an honest mistake or a wilful fabrication could meet the seemingly strong proof against him, and that is by evidence tending to show that he was not the person who did the shooting, because he was at some other place than the scene of the shooting when the shooting was done, so that he could not have been the person who did it; and he certainly, to our minds, no more undertakes the burden of proof in a cause presenting his defense in this way than he would by any other form or name of proof which could be offered under the plea of not guilty.

If the language of Mr. Justice Shaw states the principle correctly in declaring that proof of an *alibi* is not sufficient unless it outweighs the proof that he was at the place where the offense was committed, then we see no reason why the courts, by mere judicial decree, might not go a step further and say that the proof that the defendant did not commit the criminal act could not be sufficient unless it outweighs the proof that he did commit it. And we would change the legal presumption that the defendant is innocent, although the grand jury has indicted him, to one holding him guilty until he has proved the indictment false.

We are unwilling to take a single step in this direction, and must, therefore, for the error committed, reverse the judgment and order the cause remanded for a new trial.

McATEE, J., who presided in the case below, not sitting; all the other justices concurring.

SCHULTZ V. TERRITORY.

Supreme Court of Arizona, February 23, 1898—52 Pac. Rep. 352.

ALIBI: Burden of proof—Credibility of witness.

1. For a defendant to deny being present at the time and place of an alleged crime is not an affirmative defense.
2. "The burden of proof never rests upon the accused to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged."
3. An instruction that the jury may reject the entire testimony of a witness who has sworn falsely to one material fact is erroneous, in that the witness might have been honestly mistaken.

Appeal from the District Court of Yavapai County; Hon. John J. Hawkins, Judge.

William Schultz, being convicted of manslaughter, appeals. Reversed.

William H. Barnes, for the appellant.

C. M. Frazier, Attorney-General, and *H. D. Ross*, District Attorney, for the Territory.

DAVIS, J. The defendant, William Schultz, was tried at the June term, 1897, of the district court of Yavapai county, upon an indictment charging him with murder. He was convicted of manslaughter, and sentenced to a term of ten years' imprisonment in the Territorial prison. The appeal is from the judgment of conviction, and from an order denying the defendant's motion for a new trial.

The appellant bases his contention for reversal upon two instructions given by the trial court at the request of the prosecution. One of these instructions was in the following language: "The court instructs the jury that the defendant claims, as one of his defenses, what is known in law as an *alibi*; that is, that, at the time the homicide with which he is charged was committed, he was at a different place, so that he could not have participated in its commission. The burden is upon the defendant to prove this defense for himself, by a preponderance of evidence; that is, by the greater and superior evidence. The defense of *alibi*, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime

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charged, the accused was at another place, so far away or under such circumstances that he could not with any ordinary exertion have reached the place where the crime was committed so as to have participated in the commission thereof." While conceding that it is not without authority for its support, we do not think this instruction fairly and correctly states the law applicable to the defense of *alibi*. The burden of proof never rests upon the accused to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged. The defendant's presence at, and participation in, the *corpus delicti*, are affirmative material facts that the prosecution must show beyond a reasonable doubt to sustain a conviction. For the defendant to say he was not there is not an affirmative proposition; it is a denial of the existence of a material fact in the case. He meets the evidence of the prosecution by denying it. If a consideration of all the evidence in the case leaves a reasonable doubt of his presence, he must be acquitted. We hold that the instruction given may have misled the jury to the prejudice of the rights of the defendant. It, in effect, said to the jury that evidence tending to show such *alibi* is not to be considered in favor of the defendant, unless it outweighs all the evidence in opposition to it. We think it was the duty of the trial judge to have said to the jury that they must consider all the evidence in the case, including that relating to the *alibi*, and determine from the whole evidence whether it was shown beyond a reasonable doubt that the defendant had committed the crime with which he was charged. The burden of proof was not changed when the defendant undertook to prove an *alibi*, and if, by reason of the evidence in relation to such *alibi*, the jury should doubt the defendant's guilt, he would be entitled to an acquittal, although the jury might not be able to say that the *alibi* had been fully proved. *People v. Nelson*, 85 Cal. 421, 24 Pac. Rep. 1006; *People v. Tarm Poi* (Cal.), 24 Pac. Rep. 998; *Walters v. State*, 39 Ohio St. 215; *Davis v. United States*, 160 U. S. 469, 59 Sup. Ct. 353.

The other instruction complained of was as follows: "The court instructs the jury that if they find from the evidence, beyond a reasonable doubt, that any witness in this case has sworn falsely as to any material fact, then the jury may disregard the

whole testimony of such witness, except in so far as it is corroborated by other credible testimony." This instruction was also erroneous. Before the jury can disregard the testimony of a witness, it must appear that the witness has knowingly and intentionally sworn falsely. A witness might testify falsely, and yet be honest; and the mistake of one who ignorantly and unintentionally testifies falsely is not sufficient to permit his entire testimony to be disregarded. As was said by this court in *Follett v. Territory*, 33 Pac. Rep. 869: "The maxim, '*Falsus in uno, falsus in omnibus*,' applies only in case the witness has knowingly and wilfully sworn falsely." This instruction is also condemned in *Pope v. Dodson*, 58 Ill. 365; *McClure v. Williams*, 65 Ill. 392; *Barney v. Dudley* (Kan. Sup.), 19 Pac. Rep. 550; *Hillman v. Schwenk*, 68 Mich. 293, 36 N. W. Rep. 77; *Express Co. v. Hutchins*, 58 Ill. 44; *Swan v. People*, 98 Ill. 610.

For the erroneous instructions given, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

NOTE (by J. F. G.).—In *Walters v. State*, 39 Ohio St. 215 (cited in above opinion), the court said: "We think it was the duty of the judge to have said to the jury that they must consider all the evidence in the case, including that relating to the *alibi*, and determine from the whole evidence whether it was shown beyond a reasonable doubt that the defendant had committed the crime with which he was charged. The burden of proof was not changed when the defendant undertook to prove an *alibi*, and if, by reason of the evidence in relation to such *alibi*, the jury should doubt the defendant's guilt, he would be entitled to an acquittal, although the jury might not be able to say that the *alibi* was fully proven."

Even a wilful false statement does not necessarily destroy the entire testimony of the witness.—In *Hoge v. People*, 117 Ill. 35, 6 N. E. Rep. 796, we find the following:

"The eleventh and twelfth instructions, given at the instance of the People, are as follows:

"'11. You are the sole judges of the credibility of the witnesses in this case, and the credit to be given to each is to be determined by you from considering the probability or improbability of their statements; their means or want of means of knowledge of the facts to which they testify; their manner upon the stand; their contradictory statements, if any, whether or not they were contradicted by other witnesses, or by facts and circumstances appearing in evidence. And if you believe, from the evidence, that the witness Hennessy has testified falsely as to any material fact in this case, then you may, and it is your duty to, disregard his entire evidence, except so far as he is corroborated by

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other credible evidence, or by facts and circumstances proved on the trial.

"12. If you believe, from the evidence, that the witness J. E. Hanna has received or agreed to receive any money in this case, then you should consider that fact in determining what credit, if any, you should give to his testimony. And if you believe, from the evidence, that J. E. Hanna has testified wilfully and corruptly false as to any material fact, then you will disregard his entire testimony, excepting so far as he is corroborated by other credible evidence, or by facts and circumstances proved on the trial."

"These instructions are both erroneous, and have frequently been condemned by this court. The eleventh omits the very material qualification that the false testimony shall have been wilful, and both assert that the jury *must* disregard the testimony. The jury *may*, but they are not *bound to*, disregard the evidence. *United States Express Co. v. Hutchins*, 58 Ill. 44; *Pope et al. v. Dodson*, id. 360; *Otmer v. The People*, 76 id. 149; *Gullihier v. The People*, 82 id. 146; *Swan v. The People*, 98 id. 612."

PEYTON ET AL. v. STATE.

54 Neb. 188—74 N. W. Rep. 597.

Filed March 17, 1898—No. 9,852.

ALIBI: Instructions—Evidence.

1. "*Alibi*," as employed to express the defense of the accused person in a criminal action, means the claim of the party charged of presence at the time the crime is pleaded to have been committed at a place other than the one alleged of the crime.
2. The distance of the place where a party who is charged claims to have been at the time from the alleged location of the commitment of a crime, while necessarily elemental of the different places, is not the controlling fact or element; and it is not proper to instruct a jury that in a defense of *alibi* it must appear that the distance was so great as to preclude the possibility that the accused could have been at the stated scene of the crime charged.
3. In a criminal case the burden of proof is not upon the person on trial to establish an *alibi*, and an instruction by which a jury is informed that it is, is erroneous.
4. Where the defense in a criminal action is an *alibi*, it is sufficient to call for a verdict of acquittal if the jury, from a consideration of all the evidence, have a reasonable doubt of the presence of the accused at the place and time of the alleged crime, whether such doubt be from lack of proof on the part of the State, or from the evidence adduced in behalf of the party charged.

(Syllabus official.)

Error to the District Court, Douglas County; Hon. B. S. Baker, J. Reversed.

T. J. Mahoney and Duffie & Van Dusen, for the plaintiffs in error.

C. J. Smyth, Attorney-General, and *Ed. P. Smith*, Deputy Attorney-General, for the State.

HARRISON, C. J. In an information filed in the district court of Douglas county the plaintiffs in error were charged in a first count thereof with the crime of shooting a designated person with an intent to kill him; in a second count, with shooting said person with an intent to wound him. On arraignment each pleaded not guilty. A trial of the issues resulted in a conviction of plaintiffs in error of the commission of the crime charged in the second count of the information, and subsequently each was sentenced to imprisonment in the penitentiary for a period of four years. Of the proceedings during the trial a review on behalf of the convicted parties is the object of the error proceeding in this court.

Of the defenses interposed for plaintiffs in error in the trial court was that of an *alibi*. Testimony was introduced which tended to establish that at the time the crime was committed, with the perpetration of which plaintiffs in error were charged, they were at home, not present at the scene of such crime, and could not have been. In its charge to the jury the trial court gave an instruction, numbered 6, on the subject of the defense, to which we have just referred, which instruction was in the following terms: "The defendants claim as a part of their defense what is known as an *alibi*; that is, at the time the crime with which they stand charged was being committed they were at such a distance and different place that they could not have participated in its commission. The defense of *alibi*, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime the accused were at another place, so far away and under such circumstances that they could not, with ordinary exertion, have reached the place where the crime was committed. Proof of an *alibi* must be sufficient to raise in your minds a reasonable doubt of the defendants' pres-

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ence at the time and place of the commission of the crime charged." This, it is insisted, was erroneous and prejudicial to the rights of the parties on trial, in that it embodied an incorrect definition of the defense relative to which it was framed and read for the information of the jury.

An *alibi* in criminal law is defined in Black's Law Dictionary as follows: "Elsewhere; in another place. A term used to express that mode of defense to a criminal prosecution, where the party accused, in order to prove that he could not have committed the crime with which he is charged, offers evidence to show that he was in another place at the time; which is termed setting up an *alibi*." And in 2 Am. & Eng. Ency. Law (2d ed.), 53, "The word '*alibi*' means, literally, 'elsewhere,' and a prisoner or accused person is said to set up an *alibi* when he alleges that, at the time when the offense with which he is charged was committed, he was 'elsewhere;' that is, in a place different from that in which it was committed." The trial court made use of the words "at such distance and different place that they could not have participated in" the commission of the crime, in defining an *alibi*. The expression as to the element of distance was an incorrect one. That parties charged with acts constituting a crime were at a place other than that of the alleged acts embraces necessarily as elemental of its existence as a fact that they were also at some distance from the alleged place of the commitment of the crime. But that the distance disclosed by the evidence be long or short is not always an absolutely controlling fact. It can do no more than to lend greater or lesser countenance and force to the defense in a degree proportionate to its extent. That the distance must be such as to preclude any possibility of a participation in the crime as was expressed in the instruction quoted was incorrect, conveyed a wrong impression, and was calculated to prejudice the rights of the parties on trial.

What we have just said is equally forcible and applicable to the portion of the instruction in which the jury was told that the defense presented, to be entitled to consideration, must establish that when the crime was committed the accused were so far away and under such circumstances that they could not by ordinary exertion have reached the place of the crime. This

was wrong in its absolute requirement that it be shown that the place where plaintiffs in error claimed to have been other than that of the crime was so far distant from the latter that the parties charged could not by any ordinary exertion have been at the latter place.

The instruction was also objectionable for casting the burden of proof of the *alibi* on the plaintiffs in error. In regard to the burden of proof generally in criminal cases it was stated in *Gravelly v. State*, 38 Neb. 871: "In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the State throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendants' guilt beyond a reasonable doubt. That rule applies not alone to the case as made by the State, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged." (See citations in the body of the opinion, page 873.) It was said by Maxwell, C. J., in *Burger v. State*, 34 Neb. 397: "An instruction that 'if you find the defendants tendered a reasonable doubt' is erroneous, as it in effect shifts the burden of proof onto the accused. The true rule is that if upon all the evidence the jury entertain a reasonable doubt of the guilt of the accused they should acquit." In *Casey v. State*, 49 Neb. 403, directly on the subject of the defense of an *alibi*, it was held: "It is error to instruct that the accused in a criminal prosecution is required to prove an *alibi*. It is sufficient to entitle him to an acquittal if the jury, from a consideration of all of the evidence, entertain a reasonable doubt of his presence at the commission of the crime charged, whether such doubt arise from a failure of proof on the part of the State, or from evidence submitted by the accused in his own behalf." In the body of the opinion it was stated: "There are, it must be confessed, precedents for the instructions complained of, but the sound rule is believed to be that the accused in a criminal prosecution is entitled to an acquittal whenever the jury, from a consideration of all of the evidence adduced, entertain a reasonable doubt of his presence at the time and place where the crime is shown to have been committed." In the opinion in the case of *Henry v. State*, 51 Neb. 149, appears the following state-

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ment: "We are also of the opinion that the court erred in giving instructions Nos. 10 and 11, by which the burden was imposed upon the accused of proving his presence in Franklin county for such length of time that it was impossible for him to have been present at the commission of the homicide. It follows logically, if not necessarily, from the decisions of this court, that the proof of an *alibi* is not required to cover the entire period within which the offense might possibly have been committed, but that the accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged." See also *McLain v. State*, 18 Neb. 154; *Beck v. State*, 51 Neb. 106; *State v. Child*, 40 Kan. 482, 2 Am. & Eng. Ency. Law (2d ed.), 55, note 3. For the error in giving the instruction under consideration, the judgment must be reversed and the cause remanded.

There are other assignments of error argued in the briefs filed herein, but we do not deem their discussion necessary and will omit it.

Reversed and remanded.

THE STATE v. TAYLOR.

118 Mo. 153—24 S. W. Rep. 449.

Division Two, November 21, 1893.

ALIBI: Discrediting witness—Res gestæ—Separate offense—Remarks of counsel—Error presumed prejudicial.

1. A witness, to discredit him, may be asked whether he was arrested for another offense and sent to jail. *State v. Miller*, 100 Mo. 606, followed.
2. Evidence against a defendant, competent as part of the *res gestæ*, is not admissible because it may show him to be guilty of another crime.
3. Testimony of a police officer that he met defendant, who was on trial for rape, on the night of the crime near where it was committed, just as defendant was approaching a bridge near the line of another State, and that on his attempt to stop him defendant fired a revolver at the officer, is competent as showing defendant's presence in the vicinity of the crime and also as showing an attempt to escape; and this is true although the officer had not been informed of the crime.

4. Improper remarks of counsel not made the subject of an exception will not be considered on appeal.
5. An instruction to find the defendant not guilty, if at the time the offense was committed he was at a place other than that of its commission, is erroneous, because it is not required that the jury should find as a fact that defendant was at such other place, whereas he is entitled to an acquittal if there is a reasonable doubt that he was present.
6. Nor is such erroneous instruction cured by a general one given on the subject of reasonable doubt, for the two instructions are necessarily conflicting.
7. Under Revised Statutes, 1889, section 4206, the trial court should in a criminal case specially instruct the jury on the law in reference to an *alibi*, where that defense is raised by the evidence; and where an erroneous instruction is in such case asked by the defendant, it is the duty of the court to give a correct one in place of it.
8. Wherever it is the duty of the trial court upon a proper request, in a criminal case, to instruct the jury upon any material question of law arising on the evidence, it is equally obligatory upon it, of its own motion, to instruct the jury upon such matter, whether requested to do so or not.

Appeal from Jackson Criminal Court; Hon. Jno. W. Wofford, Judge. Reversed and remanded.

Scott Ashton and J. S. Brooks, for appellant.

- (1) The court erred in refusing to give instructions numbered 9 and 9a of the instructions asked by defendant. They properly stated the law as to the defense of an *alibi*. 2 Thompson on Trials, sec. 2440; *McLain v. State*, 18 Neb. 160; *Campbell v. People*, 109 Ill. 565; *State v. Edwards*, 109 Mo. 315.
- (2) The court erred in not granting a new trial because of the inflammatory language of the prosecuting attorney, who stated in his closing argument to the jury, "All the sixteen-year-old girls and the fathers of all girls in Jackson county whisper to you to-day to convict this man." *Haynes v. Trenton*, 108 Mo. 133; *State v. Jackson*, 95 Mo. 653; *Conn v. State*, 11 Tex. App. 400.
- (3) The court erred in permitting Officer Thomas to state to the jury the ground of his feeling against the defendant. *Butler v. State*, 34 Ark. 480; *People v. State*, 62 Ala. 237; *Chelton v. State*, 45 Md. 570.
- (4) The court further erred in permitting the witness Copeland to tell that defendant got ten cents from him, thereby permitting the State to prove an additional and different crime.
- (5) The verdict is contrary to the evidence.

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R. F. Walker, Attorney-General, Morton Jourdan, Assistant, and Marcy K. Brown, Prosecuting Attorney, for the State.

(1) The testimony of Officer Thomas was competent. 1 Bishop, Crim. Proc. (3d ed.), secs. 118-126; *State v. Leabo*, 89 Mo., *loc. cit.* 258; Rev. Stat. 1889, sec. 415; *State v. Keele*, 105 Mo., *loc. cit.* 42; *State v. De Mosse*, 98 Mo. 342; *State v. Jackson*, 99 Mo., *loc. cit.* 63; 1 Bishop, Cr. Law, secs. 995, 996. (2) The extent to which parties may pursue even collateral matters, in the examination of witnesses, for the purpose of establishing the prejudice or feelings of a witness toward the parties, rests largely in the discretion of the trial court, which will not be too severely reviewed by the higher tribunal. *Ellsworth v. Potter*, 41 Vt. 685; *Powers v. Leach*, 26 Vt. 270. (3) Any efforts of a defendant, shortly after the commission of a crime, to escape, or to evade or avoid arrest, or to elude justice, and all acts done toward consummating such escape, or evading such arrest, have always been held admissible as creating a strong presumption of guilt. 1 Bishop, Crim. Proc. (3d ed.), sec. 1250; *State v. Moore*, 101 Mo., *loc. cit.* 339; *State v. King*, 78 Mo., *loc. cit.* 551; *State v. Williams*, 54 Mo. 171. (4) It is always competent for the State to show all the acts of a defendant having any tendency to prove or bearing upon his guilt, even though such acts involve the commission of another and totally different crime. *State v. Rider*, 95 Mo., *loc. cit.* 485; *State v. Williamson*, 106 Mo. 163; *State v. Greenwade*, 72 Mo. 298; 1 Bishop, Crim. Proc. (3d ed.), secs. 1126-1128, 1129; 2 Bishop, Crim. Proc. (3d ed.), secs. 261, 428. (5) The court did not err in its ruling on the instructions, and the evidence is amply sufficient to support the verdict. (6) It was improper to ask witness if he had been arrested and put in jail for stealing; though to show his conviction of that offense would have been proper. *State v. Douglass*, 81 Mo. 234; *State v. Rugan*, 68 Mo. 214; *State v. McGraw*, 74 Mo. 573; *State v. Lewis*, 8 Mo. 110; *State v. Jennings*, 81 Mo. 185; *State v. Howard*, 102 Mo. 142; *State v. Taylor*, 98 Mo. 240. (7) The instructions on the question of *alibi* were complete, correct, and in the forms approved by this court. *State v. Rockett*, 87 Mo. 668; *State v. Johnson*, 91 Mo. 442; *State v. Sanders*, 106 Mo. 195; *State v. Shroyer*, 104 Mo. 448; *State v. McCoy*, 111 Mo. 517. (8) The same doctrine has

been approved in *State v. Sutton*, 70 Iowa, 268; *State v. Reed*, 62 Iowa, 40. (9) A general instruction to acquit, if a reasonable doubt exists, is sufficient. *State v. Wheeler*, 108 Mo. 638; *State v. Dunn*, 18 Mo. 419; *State v. Crawford*, 34 Mo. 200; *State v. Rockett*, *supra*; *State v. Elliot*, 98 Mo. 151; *State v. Whalen*, 98 Mo. 222; *State v. McKinsey*, 102 Mo. 630. (10) *Alibi* is as any other defense and governed by same rules. *State v. Sanders*, *supra*; *State v. Johnson*, *supra*; *State v. Jennings*, *supra*; *State v. Rockett*, *supra*; *People v. Levine*, 85 Cal. 41; *People v. Wong Ah Foo*, 69 Cal. 182; *People v. Lattimore*, 86 Cal. 403; *State v. Reed*, 62 Iowa, 40; *State v. Kline*, 54 Iowa, 185; *State v. Red*, 53 Iowa, 70; *State v. Blunt* 59 Iowa, 469. (11) The rule is that no instruction need be given as to *alibi* for the reason that the same is fully covered by the reasonable-doubt instruction as usually given. *State v. Shroyer*, 104 Mo. 448; *State v. McCoy*, 111 Mo. 517; *Ayres v. State*, 21 Texas App. 399; *McAfee v. State*, 17 Tex. App. 131; *State v. Sutton*, 70 Iowa, 268; *State v. Cross*, 68 Iowa, 180; *State v. Stewart*, 52 Iowa, 284.

GANTT, P. J. The defendant, a negro man, was indicted in the criminal court of Jackson county, for rape upon Lulu Butcher, a white girl about sixteen years old. He was indicted and sentenced to the penitentiary for fifteen years.

The testimony tends to show that on the night of September 25, 1891, at Kansas City, Missouri, Lulu Butcher, a young white girl of sixteen years, was returning to her home, in the southern part of that city, from a dance. With her was a young man or boy, Ed. Copeland, of about the same age, who was acting as her escort. They were walking, the street cars having ceased to run for the night. When they reached a point on Grand avenue, between Twenty-sixth and Twenty-seventh streets and near the Union cemetery, a man, whom they afterwards identified as defendant, stepped out from the shadow on the roadside and placed a pistol at the head of young Copeland, who was entirely unarmed, and compelled him to throw up his hands. He then proceeded to search his pockets. The robber then tied Copeland's hands behind his back and forced him and Miss Butcher, under threats, to leave the road or street and go down

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into a depression, on the side of, but near to, the road. Then he either threw Copeland down or compelled him to lie down. He ordered the girl to lie down, and then and there committed the rape. In her testimony she admits she made no outcry, or resistance, because she was afraid he would kill her if she did.

On the part of defendant it was shown that a Mrs. Holmes resided on the lot adjoining the cemetery, and that there was a gaslight in the vicinity. The dimensions of the cemetery are not given. The defendant was shown to be a man six feet in stature. After the crime was perpetrated her assailant permitted Miss Butcher and young Copeland to return to her home, which she reached about one o'clock the next morning. She at once told her mother, and on this complaint the defendant was arrested the next day and was identified by both Miss Butcher and Copeland.

Two other witnesses, Doc. Miller and Police Officer Thomas, testified to seeing defendant in that part of the city later in the night, or early morning of Friday. The officer hailed him on the approach of the bridge on the Belt Line railroad, near the Kansas State line, inquiring what he was doing out so late that night. After a moment's conversation, and without warning, the defendant fired his revolver at the officer; the ball passing through a portion of his clothing and grazing his club and scabbard.

The defendant relied upon an *alibi*. He testified that he spent all that night at the pool room of John Talbott; that De Wolf, a mechanic, was there repairing the tables, and that Talbott had employed him to assist about the place, and to remain there all night, because there were no locks upon the door; that Talbott left the money with him to pay De Wolf when he finished the job; that he remained and did pay De Wolf. Talbott testified that when he left the room that night, he left Taylor, the defendant, in charge, with money to pay De Wolf; that it was then between twelve and one o'clock. De Wolf fully corroborates Talbott as to the fact of defendant's presence at the pool room that night, and says he left defendant there when he finished the tables; that he thinks it must have been two o'clock, from the fact that the street cars stopped running at twelve o'clock, and he thinks they had been stopped at least two hours.

This pool room was at the corner of Nineteenth and Walnut streets. If this evidence is to be credited it shows a complete *alibi*, as it covers the time of the rape, fully, and places defendant at a considerable distance from the place of its perpetration.

The other facts and the instructions complained of will appear in the further discussion of the case.

I. There was sufficient evidence to justify the verdict of the jury, if credited by them.

II. Counsel for defendant, in the cross-examination of the State's witness Miller, asked this question: "After this thing occurred, were you not arrested for stealing billiard balls from Boulanger's saloon, and sent to jail?" On the objection of the prosecuting attorney, the court ruled the witness need not answer. The defendant was entitled to have the question answered. The evident purpose of the interrogatory was to discredit the witness. In such a case the mere fact that it touched upon a conviction which must have been of record is not sufficient to exclude it. Wharton, *Crim. Ev.*, in sec. 474, states the rule as follows: "In a leading case, Lord Ellenborough, C. J., compelled a witness to answer whether he had not been confined, for theft, in jail; and, on the witness's appealing to the court, said, 'If you do not answer I will send you there.' In this country there has been some hesitation in permitting a question the answer to which not merely imputes disgrace, but touches on matters of record; but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer." Citing *Real v. People*, 42 N. Y. 270; *Com. v. Bonner*, 97 Mass. 587, and many other cases.

This court in *State v. Miller*, 100 Mo. 606, in an opinion by Sherwood, Judge, adopted the rule as stated by Wharton as follows: "Was error committed in refusing permission to the defendant to interrogate Mortimer as to whether he had not been in the penitentiary two or three times? In order successfully to ask and have answered such a question, it seems to be unnecessary to produce a record of conviction. Such record only has to be produced where it is proposed to show that the witness has been convicted of some crime, in which case the judgment of conviction is the only competent evidence. It is otherwise, however, where the question is asked the witness for the purpose of hon-

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estly discrediting him; then the question is competent. This is the tendency of adjudication in this country." Wharton, Crim. Ev. (8th ed.), sec. 474, and cases cited; Chamberlain's Best on Ev. (Ed. 1893-94), p. 602, American Notes, 2; 1 Bishop, Crim. Proc., sec. 1185.

But it is insisted that, notwithstanding error was committed by the trial court in not permitting the witness to answer this question, still, inasmuch as the court permitted defendant to show in the subsequent examination of this witness *that he was in the county jail*, and had conversation with one Clark, a prisoner therein, that the error is cured, on the ground that "although a competent question is at first excluded, still, if upon further examination the party receives the *full benefit of the excluded question, he has no cause of complaint.*" An examination of the record, however, will disclose that the court only permitted him to be asked that, "while in the jail, if he met a man by the name of Clark, a prisoner in the jail." To this he answered, "there was a man in jail by the name of Clark, but I don't remember his first name." He was also asked as to his conversations with Clark about defendant, but nowhere in his examination or elsewhere in the record is the query whether he was arrested "for *stealing* Boulanger's billiard balls, and sent to jail" for that cause. For aught that appears to the contrary in his evidence, it might have been well argued that he was merely a visitor to the jail to see Clark. Merely being in a jail is quite a different thing from being sent to jail for theft. The rulings positively excluded the evidence which tended to discredit the witness, and the subsequent examination did not supply it and did not cure it.

When it is considered that this witness is the principal one by whom the State identified the defendant, in the immediate vicinity of the crime at two o'clock that night, it can readily be seen how important to defendant was the right of a searching cross-examination and any evidence that might discredit him. The crucial test of any witness is his cross-examination. It will not do to deprive one on trial for his liberty of this privilege, and then denominate it in this court as "*harmless error.*" Greenleaf, Ev. (15th ed.), sec. 446. Error is "presumptively prejudicial," and it devolves upon the party asserting its harmless-

ness to show it affirmatively. This is the rule in this court. *Hawes v. Stock Yards Co.*, 103 Mo. 60; *Dayharsh v. Railroad*, 103 Mo. 570; *McGowan v. St. Louis Ore and Steel Co.*, 109 Mo. 518. The Supreme Court of the United States has gone further still and asserted that "it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights." *Deery v. Cray*, 5 Wall. 807; *Smith v. Shoemaker*, 17 Wall. 630; *Gilmer v. Higley*, 110 U. S. 47; *Railroad v. O'Brien*, 119 U. S. 99.

In view of the fact that this is a criminal charge of the most heinous character, one for which the penalty may be death under our statute, and in view of the principle involved, we are constrained to hold the refusal to permit the question to be answered was reversible error. *Muller v. Hospital Ass'n*, 73 Mo. 242; *State v. Leabo*, 84 Mo. 168; *State v. Cox*, 67 Mo. 392.

III. When the witness Copeland was on the stand, the prosecuting attorney asked him if the defendant got anything from him, and he answered "he got ten cents." This is assigned as error, because tending to prove a distinct offense from that charged in the indictment. The answer was clearly admissible, as part of the *res gestæ*, and in such a case it is not incompetent because it tended to show defendant guilty of robbery as well as rape. *State v. Greenwade*, 72 Mo. 298; *State v. Underwood*, 75 Mo. 230.

IV. There is no merit in the eighth assignment. The witness answered the question without hesitation, and the trial court very properly refused, under these circumstances, to permit counsel to badger her and require her to answer whether she had told the truth on a former trial. Such a mode of cross-examination is only tolerable when a witness is contumacious. The facts in this case did not warrant such a course.

V. The court did not err in refusing to instruct the jury that, in arriving at their verdict, they should not consider the testimony of Officer Thomas as tending to prove the offense charged in the indictment, nor was there error in receiving his evidence, to the effect that he met defendant on the night of the commission of the rape, in the southern portion of the city, and that defendant, without provocation, shot at him. It was proper for the State to show any and all acts of the defendant that had a

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tendency to prove his guilt. It is not a question of the weight, but the competency, of the evidence. It was competent as tending to rebut the *alibi*. The mere fact that the officer did not know that defendant was suspected or charged with the offense did not render the acts and conduct of the defendant incompetent. *State v. Grant*, 79 Mo., *loc. cit.* 136. When the defendant encountered the officer in his uniform and armed and was halted, if guilty, he was conscious of the danger that might ensue from arrest, and he evidently determined, if necessary, to kill the officer to prevent arrest. If innocent, he had nothing to fear from any officer. His conduct in thus eluding the officer is strong evidence of his guilt. *State v. Moore*, 101 Mo. 319, 14 S. W. Rep. 182; 1 Bishop, Crim. Proc. (3d ed.), sec. 1249, and cases cited.

Defendant is certainly in no position to complain that the court did not instruct the jury that his flight was evidence of his guilt.

VI. We are forbidden to notice the alleged improper remarks of the prosecuting attorney, because they were not made the ground of an exception at the time to the court. The mere incorporation of these remarks and objections thereto in *ex parte* affidavits subsequently filed with the motion for a new trial does not make them proper matter for exception. We have often so ruled this point. *State v. Howard*, 118 Mo. 127; *Campbell v. People*, 109 Ill. 577. The remark, if made, was not proper, and cannot receive the sanction of the courts.

VII. A rehearing was granted in this cause, in order that a full discussion of the prior decisions of this court in regard to instructions on the subject of *alibi* might be had.

In this case the court gave on behalf of the State the following instruction: "4. If the jury shall find and believe from the evidence that, at the time the offense charged in the indictment was committed, if you find that such offense was committed, the defendant was at a place other than the place where such offense or crime was committed, the jury will find defendant not guilty."

To the giving of this instruction the defendant then and there objected and duly excepted.

The court refused to instruct the jury as asked by the de-

defendant in the following instructions, and defendant duly excepted:

"9. When a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an *alibi*. One of the defenses interposed by the defendant in this case is what is known as an '*alibi*;' that is, that the defendant was in another place at the time of the commission of the crime. The court instructs the jury that such defense is as proper and legitimate, if proved, as any other, and all evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence, the jury have a reasonable doubt as to whether defendant was in some other place when the crime was committed, they should give him the benefit of the doubt, and acquit him. As regards the defense of an *alibi*, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the defense upon the point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.

"The court further instructs the jury that, if they believe from the evidence that at the time of the alleged rape and at the hour the crime was committed, the defendant, Taylor, was at the billiard room of John Talbott, as testified to by some of defendant's witnesses, and was not present at the scene of the rape at the time of the commission, then you must acquit the defendant.

"The jury are instructed that, if you entertain a reasonable doubt as to whether or not the defendant, Taylor, was at Talbott's billiard room or at the scene of the rape at the time the rape was committed, then it was your sworn duty, under the law, to give the benefit of the doubt to the defendant."

"9a. The jury are instructed that, if you entertain a reasonable doubt as to defendant's guilt, he should be acquitted, although the jury might not be able to find that the *alibi* was fully proved."

The court had previously given for the State this instruction: "9. The court instructs the jury that before they can convict the defendant they must be satisfied of his guilt beyond a reasonable doubt. Such doubt, to authorize an acquittal upon the

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reasonable doubt alone, must be a substantial doubt of the defendant's guilt, with a view to all the evidence in the case and not a mere possibility of the defendant's innocence."

A proper understanding at the outset, of the nature of the defense of *alibi*, will enable us to reach a more satisfactory conclusion.

However much this plea has been abused; however great the incentive to perjury this defense has proven, in its practical application, it is founded upon the universal law of nature that the same body or person cannot occupy two inconsistent positions at one and the same time. Thus, a defendant cannot at the time alleged have been committing a crime in St. Louis if at that time he were in Kansas City. His innocence is demonstrated by proving a fact which renders it impossible for him to have been guilty. The plea itself stands upon sure foundation, but its abuse has led some judges to denounce it as a defense "often attempted by contrivance, subordination and perjury," and to require that the evidence to sustain it should be subjected to the most rigid scrutiny. It long ago fell into disfavor with the people, and gave Charles Dickens the material out of which he constructed in part his famous case of *Bardell v. Pickwick*. It will be remembered that the author causes old Weller to lament that Mr. Pickwick had not relied on an *alibi*, and makes him say that he had three or four coachmen ready to swear to it.

But, notwithstanding the popular prejudice against the plea and notwithstanding the satire of novelists and essayists, as already said; in the very nature of the criminal prosecution, it is a legitimate defense and it flows naturally from the rule that requires the State to establish the guilt of the accused beyond a reasonable doubt. In every criminal prosecution the State assumes to show, as an essential element in his guilt, the presence of the defendant at the commission of the crime. This being true, a simple plea of not guilty, without other further plea, puts the State to the proof of his presence. If the State fails to show that the defendant was present when the crime was committed, *when, without his presence*, it is impossible for him to be guilty, the prosecution must fail.

Law writers in discussing the evidence to sustain this defense

have often inaccurately stated that the evidence of the *alibi* must cover the entire time within which the crime could have been committed. *Miller v. People*, 39 Ill. 457-464. If by this is meant that such evidence if true would be absolutely conclusive of innocence, it might be true; but to make the evidence competent no such perfect proof is required, nor is such an absolute demonstration necessary to entitle a defendant to his acquittal, as we shall abundantly show from the authorities. The weight of the evidence tending to prove an *alibi* is to be determined by the jury and although it falls short of absolute conviction of its truth, still, if it raises in their minds a reasonable doubt of the presence of the defendant at the commission of the crime, he is entitled to an acquittal, and it is not material whether this doubt arises from the defect in the evidence of the State, or the evidence of the defendant in rebuttal.

In *People v. Fong Ah Sing*, 64 Cal. 253, it was said: "The commission of a criminal offense implies, of course, the presence of the defendant at the necessary time and place. Proof of an *alibi* is, therefore, as much of a traverse of the crime charged as any other defense, and proof tending to establish it, *though not clear*, may, nevertheless, with the other facts of the case raise doubt enough to produce an acquittal." This statement of the law by the Supreme Court of California received the unqualified and unanimous sanction of all the judges of this court in *State v. Howell*, 100 Mo. 628.

In *State v. Lewis* (1878), 69 Mo. 92, the defendant asked the trial court to instruct the jury that, if they had a reasonable doubt that the defendant was absent at the time the homicide was committed, they should acquit him, but it was refused and this court all concurred in reversing the case for this reason alone.

In *State v. Woolard*, 111 Mo. 248, this division all concurred in holding that "if the defendant's evidence is sufficient to raise a reasonable doubt of his presence at the commission of the crime, or if the State's evidence is so defective as to raise a reasonable doubt, or if, taking all the evidence on both sides, there is a reasonable doubt of the defendant's guilt, he is entitled to an acquittal.

In *State v. Jennings*, 81 Mo. 185, this court held that the

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burden of establishing an *alibi* rested upon the defendant and he must sustain it by a preponderance of the evidence. In the *Howell Case*, 100 Mo. 628, the *Jennings Case* was overruled in terms, and, we think, correctly. The rule in the *Jennings Case* required a defendant to prove his innocence and cannot be sustained on principle. *Alibi* is not an extrinsic defense. It is a traverse of the material averments of the indictment "that the defendant did then and there the particular act charged." 1 Bishop, Crim. Proc. (3d ed.), sec. 1062; Wharton, Crim. Ev., sec. 333.

We are aware that some courts have required the defendant to establish his *alibi* by a preponderance of the evidence; but in our opinion such a rule is contrary to the presumption of innocence, to which every defendant is entitled in a criminal prosecution, and to the rule that requires the State to establish his guilt beyond a reasonable doubt. The burden is on the State and must remain on it throughout the trial. The decisions in the *Lewis*, *Howell* and *Woolard Cases* are in harmony with the rule laid down in many other courts, and by approved text writers.

In *State v. Waterman*, 1 Nev. 543, it is said: "The rule of law and of common sense is, that where there is a reasonable doubt as to whether a prisoner has committed the act or offense with which he stands charged, he must be acquitted, whether that doubt arises from a defect in the evidence introduced by the State or from the evidence introduced in rebuttal by the defendant." *French v. State*, 12 Ind. 670; *Adams v. State*, 42 Ind. 373; *Binns v. State*, 46 Ind. 311; *Howard v. State*, 50 Ind. 190.

In *Walker v. State*, 42 Tex. 360, Chief Justice Roberts, in his usual clear style, states the law on the subject as follows: "The trial court instructed the jury as follows: 'The burden of proving that he was elsewhere is cast upon him. If the defendant has adduced evidence to the entire satisfaction of the jury, that on the night the murder is charged to have been committed, that he was at so great a distance therefrom, or the time was such as to make it impossible for him to have committed the offense, then the defendant must be acquitted.'" The learned chief justice said as to this instruction: "This charge was well calculated to convey the idea to the jury that the case of the State was made out by the dying declarations, 'worthy of the same credit as other

evidence,' subject to being defeated alone by the defendant proving, beyond a reasonable doubt, or to a moral certainty, or 'to their entire satisfaction,' that it was not possible for Walker to have been at Butler's when he was killed. It makes an *alibi* a defense in the nature of a plea of confession and avoidance in a civil suit; whereas it is not a defense at all in any other sense than as rebutting evidence tending to disprove the fact alleged in the indictment, that Walker killed Butler, the burden of proving which allegation rests on the State throughout the whole trial, and cannot be changed, so far as the action of the jury upon the evidence is concerned, by anything short of an admission upon the record, if such a thing would under any circumstances be a proper proceeding. . . . The obvious error in the charge consists in furnishing the jury with an artificial rule as to the degree in the strength of their conviction . . . concerning the proof of the *alibi*, before it should be allowed to have any influence on their minds in disproving the fact that Walker was the person who shot and killed Butler; whereas the rule of law is that such evidence of an *alibi* should only be of such weight as to produce upon the minds of the jury a reasonable doubt of the fact affirmed by the State, that Walker was the man who shot Butler. Such a doubt might arise in their minds by the evidence tending to prove the *alibi* before they had arrived at a moral certainty as to the truth of the *alibi*."

In *Johnson v. State*, 21 Tex. App. 368 (1886), Judge Hurt reaffirms the rule laid down by Chief Justice Roberts, and concludes his opinion with the remark: "We desire simply to add that it is well settled in this State that the burden of proving an *alibi* is not on a defendant; that an *alibi* is an attack on the presence of the defendant at the place of the crime and hence an attack on guilt." To the same effect, also, are the following cases: *Toler v. State*, 16 Ohio St. 583; *Pollard v. State*, 53 Miss. 410; *Miller v. People*, 39 Ill. 457; *Hopps v. People*, 31 Ill. 393; *Watson v. Commonwealth*, 95 Pa. St. 418; *Turner v. Commonwealth*, 86 Pa. St. 54; *Landis v. State*, 70 Ga. 652; *Chappel v. State*, 7 Cold. (Tenn.) 92; *State v. Hardin*, 46 Iowa, 623; *State v. Jaynes*, 78 N. C. 504.

Indeed, we have found but two States and one Territory committed to the doctrine that an *alibi* must be established by the

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defendant by a preponderance of the evidence, and they are Iowa, Illinois, and New Mexico.

Adhering, then, to the rule that the accused is entitled to an acquittal if the evidence as to the *alibi* raises a reasonable doubt in the minds of the jury, was there error in the giving and refusal of the instructions?

The attorney-general, in an able and exhaustive brief, insists that there was no error in the instructions. If we understand his position, it is, *first*, that it is unnecessary for the court to instruct specifically upon the subject of *alibi* if it has otherwise given a correct instruction on reasonable doubt, with a view to all the evidence in the case; *second*, that, even if required to instruct on *alibi*, the instructions given in this case were consistent, and announced the correct rule.

It was with a view to the review of the cases in this court that a rehearing was granted. Section 4208, Revised Statutes of 1889, provides, among other things, that "the court *must* instruct the jury, in writing, upon all questions of law arising in the case which are necessary for their information in giving their verdict; and a failure to so instruct in cases of felony shall be a good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial." This section was, in spirit, the reiteration of a rule announced over and over again by this court, beginning with *Hardy v. State*, 7 Mo. 608, and extending to the present time.

In view of the conflict of authority as to the burden of proof as to an *alibi* as to the amount of proof required to justify or require an acquittal, one would hardly affirm it is not a question of law arising in a case where there was evidence to sustain it. That it has been deemed a proper subject for instruction by the highest courts of the land will not be denied, in view of the amount of discussion that can be found in the text-books and adjudicated cases. If a question of law, the measure of duty is fixed by the statute. When learned courts disagree as to the proper instruction to give on this subject, it can hardly be assumed that a jury of twelve will be able to reconcile their preconceived opinions in the absence of an authoritative declaration by the court hearing the cause.

If it is the law, as we assume it to be from the adjudications

of this court, that, if the evidence tending to prove an *alibi* is sufficient to, and does, generate a reasonable doubt of defendant's guilt in the minds of the jury, they must acquit him, surely no enlightened system of jurisprudence would deny one on trial for his life or liberty the benefit of this benign rule of law.

This court has heretofore aligned itself on the affirmative side of this proposition, even in the absence of a statute. Thus, in *State v. Stonum*, 62 Mo. 597, where no instruction was asked, the court, through Wagner, Judge, said: "In *State v. Mathews*, 20 Mo. 55, it was expressly adjudged that it is the duty of the court in all criminal cases to instruct the jury as to the law; that if the instructions offered are objectionable, the court should proceed to give such as the law requires."

In *State v. Branstetter*, 65 Mo. 149, this court reversed the cause, because the circuit court failed, of its own motion, to instruct upon all the grades of the offense to which the evidence was applicable. This case was limited, by *State v. Kilgore*, 70 Mo. 558, to the grades of offense.

In *State v. Banks*, 73 Mo. 592, the defendant testified in his own behalf. His testimony tended to show he was guilty of a lower grade of homicide than murder in the first degree, of which he was convicted; but the trial court did not instruct on the lower grade, and this court reversed the case upon that ground alone. In *State v. Palmer*, 88 Mo. 568, it was reasserted.

In *State v. Brooks*, 92 Mo. 542, in a most exhaustive discussion of this particular question, Sherwood, Judge, in his dissenting opinion reviewed all the cases in this State, and favored the reversal of that cause for the failure of the court to instruct the jury upon the law of extra-judicial confessions, but the majority of the court held that, as to collateral matters, defendant must ask the instruction if he desired it. *State v. Patrick*, 107 Mo. 147; *State v. Henson*, 106 Mo. 66; *State v. Moxley*, 102 Mo., *loc. cit.* 392.

But this court, in *State v. Sidney*, 74 Mo. 390, held that the failure of the trial court to instruct the jury upon the consideration to be given an *alibi*, was reversible error of itself.

In *State v. Kelly*, 73 Mo. 608, the court had sustained the pro-

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priety of an instruction for the State, to the effect that recent possession of stolen property was *prima facie* evidence of guilt, and, if not satisfactorily explained, became conclusive, but held that this presumption was disputable and could not be rebutted by evidence of good character. In the *Sidney Case* good character was not offered, but evidence of an *alibi* was, and it was held that evidence of an *alibi* was equally potential in rebutting the presumption of guilt as good character. Sherwood, C. J., said: "In this case, as in that (*State v. Kelly*), there was no testimony as to good character, but there was testimony of equivalent force and potency; *testimony of an alibi*; *testimony which tended to rebut the accusation*; *testimony which, if believed by the jury, would well have warranted them in acquitting the prisoner*. But such testimony was altogether ignored by the instruction. This was clearly erroneous; for the jury were, in effect, told: 'It is true there is evidence of an *alibi*, but you need pay no attention to that, and, if you find that defendant had the stolen property in his possession recently after the theft, then return a verdict of guilty.' It is obvious that testimony as to good character, and testimony as to the absence of the prisoner, must occupy the same footing and be held in the same estimation, *so far as being the basis for an instruction*." To the same effect were *State v. Bruin*, 34 Mo. 540; *State v. Crank*, 75 Mo. 406; *State v. North*, 95 Mo. 616; *State v. Edwards*, 109 Mo. 315; all of which were reversed because the court failed to give the defendant the benefits of his rebuttal evidence and that of its own motion. Now, all the better considered authorities hold that an *alibi* is not an affirmative, extrinsic defense, "*but merely ordinary evidence in rebuttal*." *State v. Rockett*, 87 Mo. 666; *Walker v. State*, 42 Tex. *loc. cit.* 369; *Toler v. State*, 16 Ohio St. 583; 1 Bishop, Crim. Proc., secs. 1062-1066; *State v. Jaynes*, 78 N. C. 504.

If proper to require the trial courts to correctly instruct as to its effect in rebuttal in a larceny case, why is it not equally obligatory to instruct upon its bearing in a case of rape, or any other felony.

In *State v. Lewis*, 69 Mo. 92, this court recognized the importance of an instruction on the subject, notwithstanding in

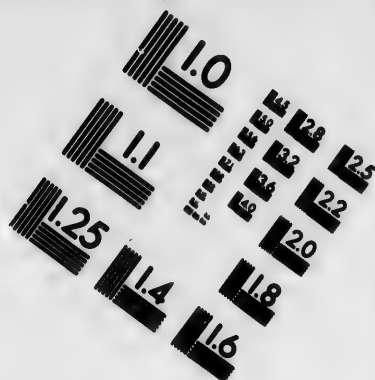
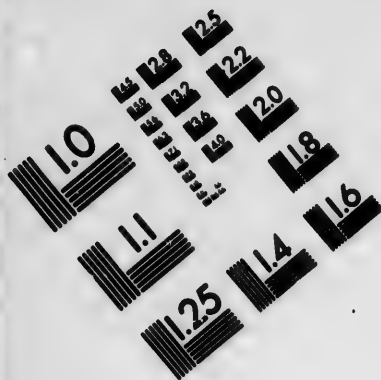
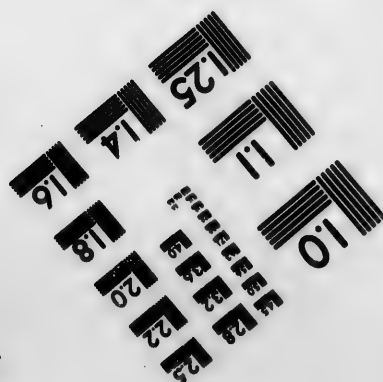
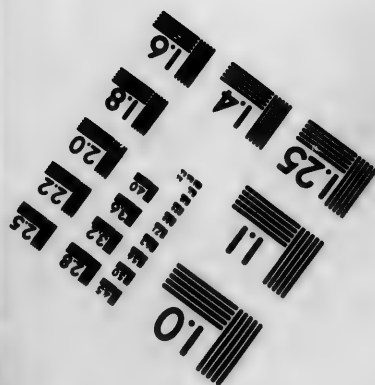
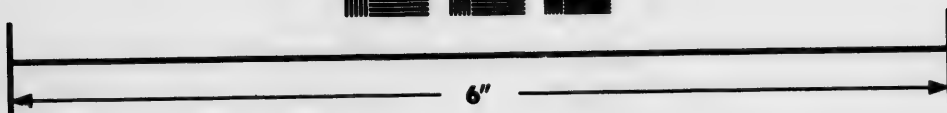
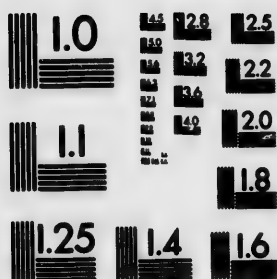


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that case the jury were fully instructed as to a reasonable doubt upon the whole case. *State v. Edwards*, 109 Mo. 315. But we are confronted by the attorney-general with the decisions of this court in *State v. Rockett*, 87 Mo. 666; *State v. Johnson*, 91 Mo. 442; *State v. Sanders*, 106 Mo. 195; *State v. Shroyer*, 104 Mo. 448.

In *State v. Rockett*, this court, without overruling, but expressly distinguishing *State v. Lewis*, held an instruction as to reasonable doubt sufficient *when there was already an instruction on alibi*. Certainly this does not conflict with any view by us herein so far expressed. But the learned judge who wrote that opinion cites *State v. Jennings*, 81 Mo. 185, as an authority, on the instruction as to *alibi*, but that case was unanimously overruled in *Howell's Case*, 100 Mo. 628. *State v. Rockett*, in so far as it approves *Jennings' Case*, is to a like extent overruled by *Howell's Case*.

In *State v. Johnson*, 91 Mo. 442, the defendant was indicted for rape. The court gave this instruction: "4. If the jury believe and find from the evidence that the defendant was not present at the place and times the alleged rape is stated to have been committed, by the prosecuting witness, Kate Farrell, but that the defendant, at the time of the alleged rape, was elsewhere, at another and different place than where the alleged rape is stated to have taken place by said Kate Farrell, then you should acquit the defendant."

Now, this instruction is the same in effect as the number 4 given in this case. It was, as stated by the attorney-general, approved by this court; but let us see upon what the court based its decision. Norton, Chief Justice, said: "The court of appeals reversed the judgment of the circuit court, as stated in the opinion, 'because (in the fourth instruction) the jury were directed to the defense of an *alibi* in language which would be likely to convey to their minds the idea that it was a substantive affirmative defense which must be made out by a preponderance of evidence, an error which was not cured by the giving of an appropriate instruction as to reasonable doubt, in its application to the whole case.' The precise question involved in the above ruling was ruled otherwise by this court in the case of *State v. Jennings*, 81 Mo. 185, and *State v. Rockett*, 87 Mo. 666." He

then cites the paragraph of Judge Sherwood's opinion in *Rockett's Case* already alluded to.

The rationale of Judge Norton's decision is simply that, this court having held in *Jennings' Case* that the burden was on the defendant to prove his *alibi* by a preponderance of evidence, the instruction 4, condemned by the court of appeals, was not error because it also required the defendant to make that defense by affirmative proof.

But when the court afterwards, in *Howell's Case*, unanimously agreed that *Jennings' Case* on this very point was not the law, it swept the whole foundation from *Johnson's Case*, and destroyed the only ground upon which it could possibly stand, because Judge Sherwood in *Rockett's Case* had expressly said, in the line of the general rule, that it was only rebuttal evidence, and not an affirmative defense. See *State v. Reed*, 62 Iowa, 40; 1 Bishop, Crim. Proc. 1062-1066. It must follow that *Johnson's Case*, like *Jennings' Case*, was overruled by *Howell's Case*. The instruction number 4, given in this case, is just like the one given in *Johnson's Case*, and the one condemned in *People v. Fong Ah Sing*, 64 Cal. 253.

The attorney-general denominates so much of Chief Justice Ray's opinion as approves the California case as *obiter dictum*. This is a misapprehension of the *Howell Case*. This court adopted the reasoning of the Supreme Court of California condemning an instruction which required the defendant to establish his *alibi* as an affirmative defense. The instruction in *Jennings' Case* was in effect the same as in *Howell's Case* and *Rockett's Case*, and the same as in *Johnson's Case* and *Ah Sing's Case*. The reasoning condemned the principle involved in each. Judge Sherwood, who had written one and agreed to the others, concurred in overruling the *Jennings Case*. The *Howell Case* was unanimously followed by this division in *State v. Woolard*, 111 Mo. 248. So that the instruction number 4 has been condemned by three decisions of this court, which are irreconcilable with the decision in *Jennings' Rockett's* and *Johnson's Cases*. Inasmuch as the great weight of authority and reason are with *Howell's Case*, we see no reason for departing from it, or questioning its controlling authority, and it must be held that instruction number 4 given for the State is reversible error, un-

less cured by the general instruction on reasonable doubt, which we understand to be the most serious contention of the attorney-general.

Let us see in what position these two instructions left the defendant. The one on reasonable doubt requires the jury to acquit him, if they had reasonable doubt from all the evidence; but the one on *alibi*, *his only defense*, required them to acquit on that, *only*, if they found that defense to be true. Could two instructions be more inconsistent and irreconcilable? The latter excludes the reasonable doubt, as to the *alibi*. As said by Hurt, Judge, in *Johnson v. State*, 21 Tex. App. 368, "These propositions are inconsistent and in direct conflict. If the burden of proof is on defendant to establish his *alibi* by a preponderance of evidence, then the doctrine of reasonable doubt cannot possibly apply. Whenever in a criminal or civil case a party is required to prove a fact (and this always means by a preponderance of testimony), the reasonable doubt does not obtain, and cannot be applied to the negative or opposite of such fact. If A. be at Galveston at a given time he is guilty, but if at Houston at that time he is not guilty. The burden is on A. to prove that he was at Houston. If this be so, a doubt that he was at Galveston is not in the proposition, because he must prove that he was at Houston, and this proof must be made by a preponderance of evidence; and a doubt that he was at Galveston does not aid his proof that he was at Houston. On the other hand, his proof that he was at Houston may not be by a preponderance of the evidence, but amply sufficient to raise a reasonable doubt that he was at Galveston." See also *Bennett v. State*, 17 S. W. Rep. (Tex.) 545.

In the present case the defendant, to correct the error of the fourth instruction, asked the court to instruct that if the evidence as to his *alibi* raised a reasonable doubt as to his guilt they should acquit him, but the court refused the instruction, clearly indicating that in its opinion a reasonable doubt alone, created by defendant's evidence, was not sufficient to acquit him. It will not do now to say that the reasonable doubt instruction cured the fourth given for the State. The burden placed upon the defendant to show his presence elsewhere, took away the free action of the minds of the jury in forming a reasonable doubt

upon the whole evidence, for the simple reason that the evidence which tended to establish his *alibi* was to be excluded from their consideration on that subject, and to only become available if it established the defense affirmatively.

The instructions are contradictory and the one as to *alibi* erroneous. The defendant's ninth instruction to the extent, *first* that it requires the court to comment upon the evidence, was erroneous; and *secondly*, so much of it as seemingly required the defendant to prove his *alibi* by a preponderance of the evidence was erroneous, but so much of it as stated that it was sufficient, if the evidence upon the *alibi* raised a reasonable doubt of his presence at the time and place of the commission of the crime, was a correct statement of the law.

While we do not think the defendant intended to require more by his instruction, we think the criticism of the attorney-general on that instruction is just, in that it apparently places the burden of *proving* the *alibi* on defendant as a condition precedent to acquittal, when a reasonable doubt would have sufficed for his acquittal.

The attorney-general has with great industry and discrimination collated cases showing that a general instruction to acquit the accused, if they have a reasonable doubt of his guilt on the whole evidence, is sufficient. Generally speaking, this is true; but, as was said when this case was decided before: "It would have been far better for defendant had the court said nothing on the subject of an *alibi*, for then the general instruction of reasonable doubt would have enabled him to have required the State to show his participation in the crime at the time and place charged;" but the court in this case was not content with such an instruction, but of its own motion went further and required the jury to find (of course from defendant's evidence, for he alone offered testimony to show the *alibi*) as a fact that he was not at another place, before he was entitled to have the benefit of a reasonable doubt as to his alleged *alibi*. The authorities cited are no authority for the contradictory and damaging instruction in this case.

The case cited by the attorney-general to show that it is not necessary to tack a reasonable doubt clause to every instruction, unquestionably announced the rule that has prevailed in this

court since its organization, for the reason that the reasonable doubt instruction was presumed to qualify each of the other instructions, but that cannot be true in this case. For instance, no court would justify the fourth instruction, if to it could be added the words "beyond a reasonable doubt." This would be to declare that an *alibi* must be proven by defendant beyond a reasonable doubt, a rule that obtains in no State of the Union, and *should not in any civilized country*. I say by the defendant, because it goes without saying, that the State will not occupy the contradictory position of attempting to show the defendant was not present at the time and place of the commission of the crime.

The case of *State v. Sanders*, 106 Mo. 188, simply holds that the instruction given in that case was substantially a correct instruction on the subject of *alibi*, and neither adds to, nor detracts from, any position assumed in this opinion. In the case of *State v. Shroyer*, 104 Mo. 448, no instruction was asked by defendant on the defense of an *alibi*, and the court gave none of its own motion, so that the questions involved in this record were not before us.

For the error in refusing to permit defendant on cross-examination of the witness Miller to ask if the witness had not been arrested for stealing Boulander's billiard balls, and sent to jail, and in giving the fourth instruction on the part of the State and refusing a proper one to defendant as to an *alibi*, the judgment is reversed and cause remanded. As the cause must be tried again, it is thought best that we should express our opinion as to the necessity for instructions on evidence tending to prove an *alibi*.

We think that evidence tending to prove an *alibi* requires the trial court, under section 4208, Revised Statutes, 1889, to instruct the jury on the defense thus raised. If an erroneous instruction on the question is asked by defendant, it is the duty of the court to give a correct one. *State v. Sidney*, 74 Mo. 390; *State v. North*, 95 Mo. 616; *State v. Edwards*, 109 Mo. 315. Especially do we hold that it is error to refuse an instruction on such evidence which informs the jury that if the evidence as to the *alibi* raises a reasonable doubt of defendant's guilt, he is entitled to an acquittal. This we regard as settled by *State v.*

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Lewis, 69 Mo. 92; *State v. Howell*, 100 Mo. 628; *State v. Edwards*, 109 Mo. 315; *State v. Woolard*, 111 Mo. 248.

Wherever it would be the duty of the trial court upon a proper request to instruct the jury upon any material question of law arising on the evidence, it is equally obligatory upon it to instruct the jury upon such matter of its *own* motion whether requested or not.

The judgment is reversed and cause remanded for a new trial. All concur.

NOTE (by J. F. G.).—*Should a witness, or defendant, on cross-examination be asked whether he has been previously arrested for or convicted of crime?* In *Bartholomew v. People*, 104 Ill. 601, in construing a section of the Illinois statute, which provides that no person shall be debarred from testifying because of a previous conviction for crime, but that such conviction may be shown for the purpose of affecting credibility, the court held that the statute only referred to such crimes as at common law rendered the convict incapable of testifying, i. e., *infamous crimes*; and that no conviction could be proven to affect the credibility of the witness except a conviction for an infamous crime, which conviction could not be proven by a copy of the *mittimus*, or the books of the penitentiary, but only by the record of the conviction. Following the *Bartholomew Case* in *Simons v. People*, 150 Ill. 66 (on page 74), the court says: "The defendant was called as a witness in his own behalf, and on cross-examination he was asked if he was not indicted and convicted of perjury in the circuit court of Barber county, West Virginia, in 1880. A general objection was interposed to the question, overruled, and the witness answered: 'I was.' The ruling of the court in the admission of this evidence is relied upon as error. The fact that the defendant may have been convicted of perjury would not disqualify him as a witness. His conviction could only be shown for the purpose of affecting his credibility. For that purpose the People had the right to prove a conviction; but they have no right to prove the fact by parol evidence. The judgment of the court where the conviction was had was the only competent evidence to establish a conviction, and that judgment could only be established by producing the record of the judgment, or an authenticated copy of the record, as we have heretofore held in *Bartholomew v. People*, 104 Ill. 608." However, the court held, in the *Simons Case*, that the objection was properly overruled because it was a general objection, notwithstanding the fact that it is a common-law duty of the court to guard the rights of a person who is on trial accused of crime.

The doctrine that parol testimony shall not be received to prove the contents of a record is based on the theory that the record is the best testimony of what it contains. This being true, it is dangerous to ask a witness as to whether or not he was charged with, or convicted of, a particular offense; for he may not have an accurate knowledge of

the legal effect of such conviction or charge. If the clerk of a court, or other person familiar with court proceeding, cannot testify as to the contents of a record, without producing the record or a certified copy of the same, certainly a person, *who by the question asked is presumed to be one of the criminal class and not educated or cultured*, should not be called upon to give his construction or opinion as to a matter of record. Considering the fact that many of the common-law offenses are modified by statute, and that indictments frequently contain many counts charging the same matter in different forms and to come under the provisions of various statutes, it is very improbable that the accused himself can always tell what he is charged with or convicted of; thus the accused might have been indicted for burglary and convicted of larceny, or of receiving stolen property; or he may have been indicted for both larceny and embezzlement, with counts to fit the various provisions of the statute; or he may have been indicted for a statutory crime making it a misdemeanor or even a felony to burn personal property, and being convicted the convict might believe he was convicted of the infamous crime of arson. The Illinois rule that the record or a certified copy thereof is only competent proof is logical.

The practice of asking a witness whether he has been arrested for, or in jail accused of, a certain offense is still more objectionable, for frequently arrests are the direct result of malice and revenge, and not founded upon any reasonable or just ground. The late Daniel Sculley, who for many years was a justice of the peace in Chicago and noted for his worthy qualities and exact justice, once informed the writer that as presiding magistrate of the police court he refused to issue warrants upon Saturdays, because such warrants were frequently procured (on Saturday) with the object of having the arrest made late in the afternoon, that the accused, upon failure to give bail, because of the late hour at which he was arrested, would thereby remain in custody over Sunday, to the gratification of his revengeful accuser. So many are the arrests, and even indictments, founded either on a misconception of the law or upon a desire for revenge without any meritorious cause of action, that no weight whatever should be attached to the fact that a certain witness has been arrested for, or accused of, some criminal offense.

STATE V. CROWELL.

149 Mo. 391—50 S. W. Rep. 393.

Decided May 9, 1899.

ALIBI: *Robbery—Instructions.*

1. The indictment charging that the robbery was committed by *putting in fear*, it is error to charge that a verdict of guilty could be based on "force and violence," as the means of committing the act.
2. It is error for the court in an instruction to say, "though an *alibi* is a well-worn defense, yet it is a legal one."

Appeal from Circuit Court of Barry County; Hon. J. C. Lampson, Judge. Reversed.

J. S. Davis and *I. V. McPherson*, for the appellant.

E. C. Crow, Attorney-General, and *S. B. Jefferies*, Assistant Attorney-General, for the State.

SHERWOOD, J. Defendant was indicted for robbery in the first degree, convicted, and his punishment assessed at five years' imprisonment in the penitentiary. There was testimony to warrant the verdict.

1. The first instruction given at the instance of the State was this: "The court instructs the jury that if you find and believe from the evidence in this case, beyond a reasonable doubt, that at the county of Barry in the State of Missouri, at any time within three years next before the finding of the indictment herein, to wit, on the 21st day of October, A. D. 1897, the defendant, Edward Crowell, either alone or with another in and upon witness, J. A. Roller, did make an assault and any money of any amount or any value whatever of the property of witness, J. A. Roller, then and there by force and violence to the person of said J. A. Roller, did rob, steal, take and carry away, with a felonious intent to deprive the owner of his property and to convert it to a use other than that of the owner or without his consent, and without any honest claim to it on the part of the taker, you will find the defendant guilty as charged in the indictment, to wit, of robbery in the first degree, and assess his punishment at imprisonment in the penitentiary for a term of not less than five years."

The following is the section under which the indictment is drawn: "Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree." R. S. 1889, sec. 3530.

It will be noted that under this section robbery in the first degree may be perpetrated in either of two ways: first, by violence to the person, or, second, by putting such person in fear of

some immediate injury to his person. The statute is in the disjunctive. *State v. Broderick*, 59 Mo. 318; *State v. Stinson*, 124 Mo. 447.

The indictment in this instance charges: "In and upon one James A. Roller, unlawfully and feloniously did make an assault, and forty-seven dollars and eighty-five cents, good and lawful money of the United States of the value of forty-seven dollars and eighty-five cents, the money and property of the said James A. Roller, in the presence and against the will of the said James A. Roller, then and there by putting said James A. Roller in fear of some immediate injury to his person, feloniously did rob, steal, take and carry away, against the peace and dignity of the State."

So that while the indictment counts on putting Roller in fear of some immediate injury to his person, the instruction quoted counts on force and violence to the person of Roller. There is therefore a marked difference between the charge in the indictment and the instruction mentioned; the former bottomed on fear, the latter on violence.

It is true that if the fact be laid to be done violently and against the will, the law in *odium spoliatoris* will presume fear (*State v. Stinson*, *supra*; *State v. Lawler*, 130 Mo. 366); yet it does not thence follow that, if you charge fear, that the law will presume violence.

The proper exception was saved to giving the instruction referred to, and the same ground was urged in the motion for a new trial, as appears in the brief filed on behalf of the State.

2. Instruction number 5 given on behalf of the State was also excepted to by defendant and such exception preserved in the motion for a new trial. That instruction reads: "The court instructs the jury that though an *alibi* may be a well-worn defense, yet it is a legal one, to the benefit of which the defendant is entitled," etc. There was error in giving this instruction, as the court is not permitted to disparage the defense of an *alibi* or to refer to it in a slighting or sneering manner; evidence in regard to an *alibi* is to be tested and treated just like evidence offered in support of any other defense, insanity, self-defense, etc. 1 Bishop, New Crim. Proc., sec. 1062; *Sater v. State*, 56 Ind. 378; *Walker v. State*, 37 Tex. 366; *Albin v. State*, 63 Ind.

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598; *State v. Gong*, 16 Oreg. 534; 11 Ency. Plead. & Prac. 360 *et seq.*, and cases cited.

3. Other points might be commented upon, but it is deemed unnecessary to so do, as the errors complained of may not again occur.

For the errors aforesaid, the judgment is reversed and the cause remanded. - All concur.

NOTES ON THE LAW RELATING TO ALIBI (By J. F. G.)—It had been our intention, as a general rule, not to report as leading cases, in this volume, any case decided prior to 1898 or subsequent to 1899, but so important is the subject of *alibi*, and so urgent the necessity for extending the application of the correct doctrine regarding it, that three cases ante-dating that period have been selected, because of the forcible and logical presentation of the subject in them.

As to the nature of the defense of an *alibi*; as to whether it is an affirmative or a negative defense; as to whether it shifts the burden of proof; as to whether it is necessary to establish it by a preponderance of evidence or by sufficient evidence to simply raise a reasonable doubt, etc.—there is a positive conflict in the courts of last resort.

The general rule, that the accused is presumed innocent and that no conviction should be had unless upon all the evidence considered together guilt is manifest beyond reasonable doubt, places the burden of proof upon the prosecution, throughout the entire trial, of proving the commission of a crime, the grade of it, and that the same was committed by the defendant; hence, evidence offered to show that the accused was not present at the time and place of the alleged crime is negative and not affirmative proof. The material inquiry in such case is whether or not the defendant was present at the time and place of the alleged crime. If, in the course of the denial of such fact, it is shown that the defendant was elsewhere, *that is but a corroborating circumstance*, and in good practice the order of proof will so demonstrate. Thus the prosecution offers proof that the defendant committed an assault, at nine o'clock P. M., July 1, at State and Madison streets, Chicago. The defendant produces a witness who testifies that between the hours of seven and ten P. M. of that day he was continuously in the company of the defendant. The question is then asked, "Was the defendant during that time in the locality of State and Madison streets, Chicago?" To which the witness responds, "No, sir, he was not." Here is a positive and complete denial, as a matter of law sufficient of itself, and presenting a proper field for cross-examination; but the prosecuting attorney may waive cross-examination, and the jurors may not be satisfied with a mere denial; accordingly the defendant's counsel, by way of corroboration, asks: "Where were you and the defendant during that time?" to which the answer comes, "We were in Milwaukee. We took supper that evening at seven P. M. at — Hotel, and then went to — Theatre, remaining there until after ten o'clock." If this general plan for introducing the testimony was fol-

lowed on all occasions, the erroneous doctrine, that an *alibi* is an affirmative defense, would soon disappear; for the method of offering the proof would demonstrate the absurdity of holding that an *alibi* is an affirmative defense.

The legitimate use of the defense termed "an *alibi*" is in cases where circumstances indicate the defendant as the guilty party; or where he is the victim of malice or perjury; or in cases of mistaken identity; the inquiry being as to whether or not he committed the alleged unlawful act or acts. Whether he was at some distant place, or simply out of the immediate locality, or was present and did not participate in the alleged crime, does not change the general nature of the defense, for in each instance he simply endeavors to rebut the testimony connecting him with the alleged crime. For example, three men are standing together, two being engaged in angry words; one of them attempts to leave, and while he is so doing is violently struck by the third man with sufficient force to throw him to the ground. By the force of the circumstances, and, it may be, aided by a vivid imagination, the victim believes the blow to have been given by his late antagonist, and causes his arrest upon the charge of assault and battery. On the trial a disinterested by-stander testifies that the defendant remaining still did not strike the blow and was five feet distant when it was struck by his silent but over-zealous friend. There is no essential distinction between that defense and where the accused is at a far distant place.

The popular notion, that a defendant undertakes to *prove an alibi*, finds support in the methods often used by defendant's counsel to gain favor with the jury. Frequently defendant's counsel joins with the public prosecutor in telling the jury that a heinous and inexcusable crime has been committed, meriting extreme punishment, but that he will demonstrate, to the entire satisfaction of the jury, that his client is innocent, by proving that at the time of the commission of the offense the defendant was at a locality or place so distant as to render participation in the act impossible. Counsel thereby assumes a burden which the law does not impose. The court and the jury are liable to accept the offer, as one made in accordance with the requirements of law; while the public prosecutor seizes upon the opportunity and comments on the real or imaginary insufficiencies in the proof of the *alibi* as incontrovertible evidence of guilt. As similar instances of this class become frequent, public opinion becomes fixed as to what is supposed to be the law upon that subject, and the judicial mind lulled into accepting repeated errors as precedent.

If counsel for the defendant, when making the defense, popularly known as "an *alibi*," would always assume and insist that the burden is on the prosecution to prove that the defendant was present and committed the alleged crime, and that the material inquiry is, whether the defendant was present at the alleged crime, and not whether he was at some other *specific* and distant place, a large majority of the trial judges would refuse to cast the burden of proving his whereabouts at the time of the alleged offense on the defendant, even though such be the announced doctrine of the higher courts of their respective localities.

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The use of the term "*alibi*," as designating a particular class of defense, should be discontinued, meaning as it does, "elsewhere" or "in another place" (Webster), as it naturally suggests a legal fiction or delusion, namely, that "*an alibi*" is an affirmative defense incumbent upon the defendant to establish. It raises a distinction that does not, and should not, exist. It diverts the attention from the true issues to be determined. It raises and creates the illogical, incoherent legal paradox, that while it is incumbent on the prosecution to prove beyond all reasonable doubt that the defendant was present at the time and place of the alleged crime, nevertheless, the burden of proof is *also* on the defendant to prove that he was elsewhere, and at a particular place, when the alleged criminal acts were committed. The general misty air surrounding this subject has induced many courts to indorse erroneous instructions based on this double-headed anomaly.

Analysis of the doctrine by Mr. Justice Hurt of Texas.—In his opinion in *Johnson v. State*, 21 Tex. App. 368, 17 S. W. Rep. 252, Mr. Justice Hurt says:

"There was testimony of quite a number of witnesses very strongly supporting an *alibi*. Upon this subject the learned judge charged the jury 'that the defendant relies on an *alibi* as a defense; that is, on proof that, at the time of the offense, if any was committed, he was at another place, which rendered it impossible for him to have been present at the commission of the offense. On this issue the burden of proof is on the defendant to show by a preponderance of evidence the facts establishing an *alibi*. But if the defendant has shown such facts as raise a reasonable doubt as to whether he could have been present at the commission of the offense . . . or not, you will acquit him.'

"These propositions are inconsistent and in direct conflict. If the burden of proof is on the defendant to establish his *alibi* by a preponderance of evidence, then the doctrine of reasonable doubt cannot possibly apply. Whenever, in a criminal or civil case, a party is required to prove a fact (and this always means by a preponderance of testimony), the reasonable doubt does not obtain, and cannot be applied to the negative or opposite of such fact.

"If A. be at Galveston at a given time he is guilty, but if at Houston at that time he is not guilty. The burden is on A. to prove that he was at Houston. If this be so, a doubt that he was at Galveston is not in the proposition, because he must prove that he was at Houston, and this proof must be made by a preponderance of evidence; and a doubt that he was at Galveston does not aid his proof that he was at Houston. On the other hand, his proof that he was at Houston may not be by a preponderance of the evidence, but amply sufficient to raise a reasonable doubt that he was at Galveston.

"Let us view these propositions at work. One of the jurors says: 'I doubt that A. was at Galveston.' To this another replies: 'So do I, but has A. proved by a preponderance of evidence that he was at Houston?' 'No,' says the first, 'but I doubt, from his evidence in support of his being at Houston, that he was at Galveston.' 'But,' replies the other, 'I know that he has not proven by a preponderance of testi-

mony that he was not at Galveston, and we are instructed by the judge that he must do this—that this burden is upon him.' In comes the third juror, and suggests that the only way out of this trouble is to obey all that the judge says upon this subject. To this all agree. 'Now, then,' says he, 'we will hold defendant to the proof that he was at Houston, for we are told by the judge that the burden is on him, and that he must prove by the preponderance of the evidence. Has he discharged this burden?' All say: 'No.' Then he must be convicted. But if he has discharged this burden, then the jury might have a reasonable doubt of his being at Galveston. But the first juror replies: 'The judge charged us that if defendant has shown such facts as raise a reasonable doubt as to whether he was at Galveston or not, we should acquit.' To this all agree; but the second juror says: 'We are also very plainly told by his honor that the burden is on him to prove that he was not at Galveston, and this must be done by the preponderance of evidence, and we have all agreed that it has not been done by him.'

"We have adopted the above manner of showing that the two propositions are in conflict, and not at all consistent, and for the further purpose of showing that they are misleading, and calculated to confuse the jury. We desire simply to add that it is well settled in this State that the burden of proving an *alibi* is not on a defendant; that an *alibi* is an attack on the presence of defendant at the place of the crime, and hence an attack on guilt."

The doctrine as announced in Oregon.—In the case of *State v. Chee Gong*, 16 Oreg. 534, error was assigned upon the giving in the court below of the following instruction: "Evidence has been introduced on behalf of the defendants to prove an *alibi*; that is, that the defendants were not present at the alleged fatal assault. When this is made out to your satisfaction it is one of the most conclusive defenses that can be set up; in fact, an *alibi* is not only a proper defense, but to an innocent man is almost always an essential defense, and, indeed, it may be his only defense. It is a defense, however, that is very often resorted to by guilty persons as well as innocent ones, and one in which perjury, mistake, and deception are often committed. The burden of proof is on the defendants to make out the defense of an *alibi* when so set up by them as a defense, the State having first introduced proof and shown that the defendants were present at, and committed, the alleged fatal assault. Therefore, while an *alibi* is a defense that should not be discredited on account of its character, still it devolves upon the jury the duty of carefully scrutinizing the testimony in such cases, and of exercising unusual care and minuteness in considering it."

In reversing the conviction because of that instruction the court said: "The evidence of an *alibi* was not a defense, except so far as it controverted the testimony upon the part of the State, tending to show that the appellants were present and participated in the affair charged in the indictment. When proof is given on the part of the prosecution which goes to show that the defendant did the acts charged against him, he has a right to disprove it by showing that he was at another place at the time of their alleged commission; and it is the exclusive

province of the jury to judge of the weight of the testimony introduced for that purpose, as much as of any other testimony in the case. It is, as said by Mr. Bishop, mere ordinary evidence in rebuttal; and any charge to the jury that it is not, as that the law looks with disfavor upon it, or that it should be tested differently from other evidence, is erroneous. 1 Bishop, Crim. Prac. (3d ed.), § 106.

"The establishment by the prosecution of a *prima facie* case does not change the burden of proof; that remains with the prosecution to the end, 'the jury, to be authorized to convict, being required to take into the account all the evidence on both sides, including the presumptions, and to be affirmatively satisfied from it with the certainty demanded by law of the defendants' guilt.' 1 Bishop, Crim. Prac. (3d ed.), § 1050. The prosecution undertakes to prove the defendant guilty beyond a reasonable doubt, not in view alone of the direct testimony adduced by it, but in view of rebutting testimony as well. The State cannot stop after making out a *prima facie* case against the defendant, and require him to prove himself innocent."

The doctrine as announced in Indiana.—In *Parker v. State*, 136 Ind. 284, 35 N. E. Rep. 1104, in reversing a conviction the court says: "The court, of its own motion, gave to the jury the following instruction: '(19) Evidence has been introduced on behalf of the defendants tending to prove an *alibi*; and if you should find, upon considering this evidence, that it is sufficient to raise a reasonable doubt in your minds as to whether the accused, or either of them, were at the place where the alleged crime was committed, then the accused, or the one as to whom such doubt arises, if it arises as to any, is entitled to acquittal; and the failure of either defendant to account for his whereabouts during all the time within which the offense might have been committed is not of itself a circumstance tending to prove his guilt, but a failure of this character may be properly considered by you in connection with any other evidence in the case tending to prove guilt, if you find that there is such.' So much of this instruction as informed the jury that a failure of the appellants to account for their whereabouts during all the time within which the alleged crime might have been committed was a fact which might be properly considered by them in connection with any other evidence in the case tending to prove guilt is, in our opinion, erroneous. The defense of *alibi* stands upon precisely the same footing as any other defense, and evidence tending to support such a defense is sufficient to secure an acquittal if it raises a reasonable doubt of the guilt of the person charged. *French v. State*, 12 Ind. 610; *Howard v. State*, 50 Ind. 190. In criminal cases the entire burden is upon the State from the beginning, and the accused is not bound to explain anything, and his failure to do so cannot be considered as a circumstance tending to prove his guilt. *Doan v. State*, 26 Ind. 495; *Clem v. State*, 42 Ind. 420. This being true, for a much stronger reason the failure or inability of an accused to fully establish, by his evidence, a defense which he attempts to prove, should not be considered by the jury as a circumstance tending to show his guilt."

In *Fleming v. State*, 136 Ind. 149, 36 N. E. Rep. 154, error was assigned

upon the refusal to give the following instruction: "And the reasonable doubt may arise from the evidence already given in the case, or for want of evidence. In this case the defendant has introduced evidence before you that he was with a young lady that he was waiting on, by the name of Lena Brattain, from about half past nine on the night of the transaction until twenty minutes of one the next morning. If this evidence raises a reasonable doubt in your minds as to whether the defendant was the person that committed the alleged transaction in the manner and form alleged, then, and in that event, you cannot convict the defendant."

In reversing the conviction the Supreme Court said: "That the instruction states correctly propositions of law applicable to the charge and the evidence is not disputed, but it is claimed by the appellee that the same propositions were included in charges given to the jury. We have read carefully all of the charges given, and feel constrained to hold that they do not cover fully the propositions of the instructions refused. The jury were nowhere told that a reasonable doubt might arise upon the evidence given, as well as for the lack of evidence. While the instruction refused is not clearly stated, it was intended to, and we think it did, present the further question that a reasonable doubt could properly arise from a consideration of the *alibi* evidence referred to, and that, if it did so arise, the jury could not convict. A general charge was given upon the subject of reasonable doubt as it should affect the jurors collectively and individually, and as it should apply to the identity of the person claimed to have committed the larceny charged, but the specific elements of the instruction asked were not given in any other charge. The first proposition stated in the instruction should have been given, if the remainder had been covered by other charges given, or, if we are in error in our construction of the second proposition stated, provided such second proposition, under any reasonable construction, was not erroneous, as a question of law applicable to the charge and to the evidence. That such second proposition was not erroneous is, as we have said, not questioned. A general instruction does not authorize the refusal of a specific instruction applicable to the charge and the evidence. *Parker v. State*, 35 N. E. Rep. 1105 (present term); *Carpenter v. State*, 43 Ind. 371. We conclude, therefore, that the refusal of this instruction was error, and that the judgment of the circuit court should be reversed."

The doctrine as announced in Alabama.—In *Pate v. State* (Ala.), 10 So. Rep. 665, error was assigned upon the refusal of the following instruction: (4) "Gentlemen, it is not necessary that the evidence in support of an *alibi* should cover every moment of time in which the offense was committed. It is only necessary to create a reasonable doubt that the defendant was there, and if, under all the evidence, there is any reasonable probability that the defendant was not present when John Orr was killed, then you must find him not guilty."

In passing upon this instruction the Supreme Court said: "When the defense is that of an *alibi*, the law casts the burden upon the defendant to reasonably satisfy the jury that he was elsewhere at the time of the

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commission of the offense. *Pellum v. State*, 89 Ala. 32, 8 So. Rep. 83. This rule of law, as applicable to the defense of an *alibi*, does not require of the defendant to reasonably satisfy the jury of his exact whereabouts every moment of the time necessary to cover the period when the offense was committed, but he is required to prove such a state of facts or circumstances as to reasonably satisfy the jury that he was elsewhere than at the place where and at the moment when the offense was committed. 1 Amer. & Eng. Enc. Law, pp. 454, 455; 1 Bish. Crim. Proc. §§ 1066, 1067; *Pellum v. State*, *supra*; *Allbritton v. State*, 10 So. Rep. 426.

"The first part of the charge requested in reference to the *alibi* was objectionable, for the reason that it was calculated to mislead. The jury might have inferred from the charge that the *alibi* was sufficiently established, although the testimony adduced in support of it did not reasonably satisfy the jury that he was elsewhere when the offense was committed. A case will not be reversed for refusing a charge which calls for an explanation. We lay down the true rule to be that proof adduced to support an *alibi* should be considered by the jury with the other evidence in the case; and if, upon the whole evidence, there is a reasonable doubt of the defendant's guilt, he should be acquitted."

It will be observed that the instruction was based on a false theory, in that it conceded that it was necessary for the defendant by evidence "to create a reasonable doubt."

The subject as it is treated in Illinois.—In Illinois there seems to be no settled doctrine, as a review of the authorities will indicate.

Hopps v. People, 31 Ill. 385, is referred to by later authorities as a precedent upon this subject. In that case the defense was insanity. The court said: "Suppose the question was one of identity, would not a reasonable, well-founded doubt on the point acquit the prisoner? Suppose an *alibi* was sought to be proved, and proof sufficient was offered to create a reasonable doubt whether the accused was at the place, and at the time, when and where the offense was alleged to have been committed, is not the prisoner entitled to the benefit of the doubt? So, if the defense be that a homicide was justifiable or excusable, is not the principle well settled, a reasonable doubt will acquit? The rule is founded in human nature, as well as in the demands of justice and public policy. Innocence is the presumption, guilt being alleged; the State making the charge is bound to prove it; the State is bound to produce evidence sufficient to convince the mind of the guilt of the party. If a reasonable doubt is raised, then the mind is not convinced, and being in that unsettled state, whatever the probabilities may be, a jury cannot convict. It is entirely impossible for them to say the accused is guilty, when they entertain a reasonable doubt of his guilt. . . . It is urged by the prosecution that the burden of proof is on the accused, to make out his defense. That sanity being a normal condition, insanity must be established by preponderance of evidence. . . . We do not understand the burden of proof is shifted on the defendant. Every man charged with crime is entitled to claim the benefit of all the provisions of the law. In every case of murder the first inquiry is,

Has the homicide been committed? Did the prisoner do the deed? Did he intend to do it? Was he of sound mind and not affected with insanity when the act was done, and was the act done with malice aforethought, expressed or implied? These are, all of them, affirmative facts, and must be proved by the prosecution."

In this case, notwithstanding the fact that all persons are presumed to be of the same mind, the court places the burden upon the State to prove such fact, evidently meaning that, unless the circumstances surrounding the case show that the defendant acted as a rational being, he should be acquitted. The reasoning of the court applies with greater force to the question as to whether or not the defendant did the act; for upon that question there can be no presumption against the defendant. The only objection to the decision is that it indicates a reasonable doubt created by the evidence, when in fact the evidence for both the prosecution and the defense should be considered as a *unit*, and then the question is, does the *entire evidence* establish guilt beyond a reasonable doubt.

Miller v. People, 39 Ill. 457, while citing *Hopps v. People* as an authority, departs from the doctrine announced; the court saying: "The theory of an *alibi* is that the prisoner was so far removed from the scene of the crime at the time of its commission as to make it impossible that he should have committed it, but he is entitled to the benefit of any reasonable doubt the jury may entertain on this point." (Reversing a conviction.)

In *Garrity v. People*, 107 Ill. 162, the court departs from the doctrine announced in the *Hopps Case*, and says: "It is apparent, from this review of the testimony, that the greater portion of it is directed exclusively to the question of *alibi*. This, indeed, was the controlling and absorbing issue on the trial in the court below. It is well settled that the *onus* of proving this defense devolves upon the accused, and it must be clearly and satisfactorily established before it can avail, where the evidence otherwise makes out a clear case against the accused." The court here evidently loses sight of the fact that no clear case is made out against the accused until all of the evidence on both sides is in; and then only if all of the evidence, considered as a *unit*, establish guilt beyond reasonable doubt. The court also departs from the doctrine in the *Hopps Case*, that if a reasonable doubt arises from the testimony the defendant should be acquitted.

In *Mullens v. People*, 110 Ill. 42, the court says: "The general rule is, where the prosecution makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is on him to make out that defense, whatever it may be; but as to an *alibi*, and all other like defenses that tend merely to cast a reasonable doubt on the case made out by the prosecution when the proof is in, then the primary question is,—the whole evidence being considered, both that given for the defendant and for the prosecution,—is the defendant guilty beyond a reasonable doubt."

At least a portion of the doctrine announced in the *Mullens Case* is repudiated in *Hoag v. People*, 117 Ill. 35 (see p. 44). The court, in reversing the conviction because of erroneous instructions given in the

court below, said: "To require the defendant to 'satisfactorily' explain his recent possession of the stolen property, and to 'satisfactorily' establish an *alibi*, before it can avail, is imposing a burden on him but little short of convincing the jury beyond a reasonable doubt (*Herrick v. Gary*, 83 Ill. 89), whereas the burden is upon the People to establish his guilt; and if, after considering the evidence introduced by him as to either or both of these questions, in connection with all the other evidence in the case, and giving due consideration to the entire evidence, the jury shall have a reasonable doubt of the defendant's guilt, he cannot be convicted. *Hopps v. The People*, 31 Ill. 385; *Miller v. The People*, 39 id. 465; *Mullins v. The People*, 110 id. 42."

In *Ackerson v. People*, 124 Ill. 563 (on p. 568), the court said: "The burden of making good the defense of *alibi* is upon the accused, and to make it availing he must establish such facts and circumstances, clearly sustaining that defense, as will be sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him." This annunciation, requiring the defendant to "establish such facts and circumstances clearly sustaining that defense," certainly is not consistent with the doctrine announced in *Hoag v. People*.

In *Aneals v. People*, 134 Ill. 401, in reviewing an instruction upon this subject (p. 416) the court said: "The jury must believe, beyond a reasonable doubt, from a consideration of all the evidence, that the defendants are guilty, before they would be justified in so finding. But these instructions did not relate to the question of guilt or innocence, strictly. By them the jury were told, in effect, that if, after considering the facts and circumstances in proof, they had no reasonable doubt of the presence of the plaintiffs in error at the house of Knox at the time of the assault, then the defense of *alibi* had not been made out, and was unavailing. The instructions were entirely proper, and not in conflict with the rule stated." It is difficult to understand why the question of guilt or innocence is not involved in the question as to whether or not the accused was present at the commission of the offense. If he was present, he might have been guilty; but if he was absent he could not have been guilty; accordingly the instruction did refer to the question of guilt or innocence.

In *Carleton v. People*, 150 Ill. 181, the court says: "As to the defense of an *alibi* the burden of making it out was upon the plaintiff in error (*Ackerson v. The People*, 124 Ill. 563), and, in order to maintain it, he was bound to establish in its support such facts and circumstances as were sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him (*Garrity v. The People*, 107 Ill. 162; *Mullins v. The People*, 110 id. 42)." If the testimony upon part of the prosecution, considered by itself, does not prove guilt beyond a reasonable doubt the defendant should be acquitted; yet the court says that as soon as the defendant denies that he was present, the burden is on him to prove his absence and maintain it by evidence that will create a reasonable doubt in the mind of the jury, which doubt may have existed before the introduction of the defendant's testimony.

A review of Iowa cases.—The case of *State v. Hamilton*, 57 Iowa, 596, has several times been cited by the Supreme Court of that State as a leading authority; but all that was said in that case upon the subject is as follows:

"The defendant claimed that he was at another place when the robbery was committed. The court instructed the jury that the burden of proof was on the defendant to establish the fact that he was not present by a preponderance of evidence. This instruction was correct and is now the settled law of the State," citing 24 Iowa, 570; 46 Iowa, 623; 53 Iowa, 69; 48 Iowa, 583; 54 Iowa, 183.

In that case Adams, C. J., filed a dissenting opinion in which he completely refutes the doctrine, and in which appears the following:

"This court has never undertaken to abrogate the rule that a reasonable doubt of guilt justifies an acquittal. It has, indeed, recognized this rule in the very cases relied upon by the majority as holding that when the defendant relies upon proving an *alibi* he must prove it by a preponderance of evidence. Both rules cannot be correct because they are inconsistent with each other. No jury can follow both. Let us suppose a case where the evidence of an *alibi* does not preponderate, but does raise a reasonable doubt of guilt, what shall a jury do? If they follow the instruction that evidence of an *alibi* must preponderate, they must convict and disobey the instruction as to reasonable doubt. On the other hand, if they follow the instruction as to reasonable doubt, they must acquit and disobey the instruction as to the evidence of an *alibi*. I cannot regard the rule adopted by the majority as to evidence of an *alibi* as being the established doctrine of this court, so long as it is inconsistent with another rule to which the court still adheres. If the court adopts the rule in question as to an *alibi*, then, to be consistent, it should modify the rule as to reasonable doubt. The rule as modified would be as follows: A reasonable doubt of guilt is sufficient to justify an acquittal, unless it is raised by evidence of an *alibi*, and if it is, then it is not sufficient."

The cases cited in the *Hamilton Case* fail to logically sustain the conclusion arrived at by the majority of the court. In *State v. Vincent*, 24 Iowa, 570, without the support of any authorities, the court says: "One of the defenses made by the prisoner is, that the body of the deceased is not that of Claiborn Showers, and that after it was found he was in life, and was seen by four witnesses at different times and places. This defense is termed an '*alibi* of the alleged deceased' in the instructions of the court and arguments of the counsel, and the jury were instructed that, to sustain it, the same weight of evidence was necessary as to sustain the *alibi* of the prisoner, which was also a defense, and that the burden of proof of each was upon the prisoner. This, it is urged, is error. The *alibi* of the prisoner, and the existence in life of Claiborn Showers at the time of the alleged murder, are each independent propositions totally inconsistent with the guilt of the prisoner. It is evident the burden of proof of each rests upon the prisoner, for neither, against *prima facie* evidence of its corresponding inconsistent proposition of the prosecution, will be presumed. These defenses, then, must be sustained by the prisoner, and the evidence nec-

essary to sustain either of them must be sufficient to outweigh the proof tending to establish its contradictory hypothesis. This is the doctrine of the instructions objected to, and it is sustained by reason and the authorities."

If the reasoning of this case were followed, it would relieve the State from proving the *corpus delicti*; for if it devolves on a defendant to prove by a preponderance of the evidence that a certain person was alive, the burden is not on the State to prove his death: one of the most essential matters of proof in a homicide case.

In *State v. Hardin*, 46 Iowa, 623, Day, C. J., says: "There is not entire harmony in the decisions as to the degree of proof of an *alibi* which must be produced in order to entitle the defendant to an acquittal." He then proceeds to review several authorities, and says: "In the opinion of the writer, these cases present the only logical and consistent doctrine. For if a reasonable doubt be created of the presence of the accused at the time and place of the commission of an offense, which he could not commit when absent, a reasonable doubt is raised as to his guilt, and a reasonable doubt of guilt, all authorities hold, entitles the accused to an acquittal."

In *State v. Northrup*, 48 Iowa, 583, the matter is disposed of in a very few lines, the court stating that there is a diversity of opinion upon the subject, but that a majority of the court adhere to the rule laid down in the 24th Iowa.

In *State v. Red*, 53 Iowa, 69, the court attempts to reconcile the doctrine of requiring an *alibi* to be proven by a preponderance of evidence and the doctrine of reasonable doubt, and says: "This rule does not abrogate the doctrine of reasonable doubt. A prisoner cannot be convicted upon a preponderance of evidence. There must exist no reasonable doubt of his guilt based upon the evidence, but there may be a preponderance of evidence against him, and yet a reasonable doubt of his guilt. In such case the jury may acquit. This reasonable doubt may be based upon the whole evidence or upon the evidence establishing certain essential facts necessary to be established, or upon evidence of facts inconsistent with the prisoner's guilt. The doctrine extends to all the evidence and to each part tending to establish independent facts. If, upon consideration of the whole evidence or any part of it, the reasonable doubt arises as to any essential fact, the jury must acquit." The reasoning of the court certainly does not support its conclusion.

In *State v. Kline*, 54 Iowa, 183, the court was called upon to pass upon two contradictory instructions, one of which required an *alibi* to be proved by a preponderance of evidence, and the other of which told the jury that if "from all the evidence there is a reasonable doubt of the defendant's guilt he must be acquitted, whether that doubt arises from a defect in the evidence on the part of the State or from evidence introduced by the defendant." The majority of the court sustained these instructions.

In *State v. Reed*, 62 Iowa, 40, Justice Adams delivered the opinion of the court, announcing that the majority of the court held that an *alibi* must be sustained by a preponderance of the evidence, but frankly says

that he and Chief Justice Day think that the defendant is entitled to an acquittal if the *alibi* is sufficient to raise a reasonable doubt of guilt; and that in his own opinion he "does not regard *alibi* as a defense within any accurate meaning of the word, but as a mere fact shown in rebuttal of the State's evidence."

In *State v. Beasley*, 84 Iowa, 83, the court says: "The burden of proving it is upon the accused, because knowledge of the truth of it and the means of proving it is peculiarly with him. A preponderance of evidence is the *lowest degree* of proof upon which issues of fact are determined, and, unless this defense is thus established, it cannot be said to be proven, and, unless proven, is not entitled to any consideration."

This reason applies with equal if not greater weight against the prosecution. The defendant says that he was absent. Therefore the State, having full knowledge of the facts of the crime, should prove the crime and identity of the criminal beyond a reasonable doubt; yet, while that burden rests upon the State, the court says it devolves upon the defendant to prove his whereabouts by a preponderance of evidence, simply because he was self-conscious as to where he was.

PEOPLE V. FIELDING.

158 N. Y. 542—53 N. E. Rep. 497.

Decided April 18, 1899.

ARGUMENT OF COUNSEL: *Improper remarks and appeals to the jury.*

1. While public prosecutors should not be restricted in "fair argument, comment or appeal" to the jury, they should not be allowed to state facts not proved, or to make inflammatory appeals to passion and prejudice, or to threaten the jury with popular denunciation, or to tell the jurors that they would be committing the "unpardonable sin" if they failed to convict the defendant.
2. It is error to allow the prosecutor to tell the jury that the defendant could not live in a certain locality for less than ten thousand dollars a year, and that tens of thousands are waiting outside for their verdict.
3. The probable effect of such appeals is to divert the attention of the jury from the evidence, prejudice them against the defendant, and prevent the exercise of sound, dispassionate judgment upon the merits.
4. The approval of the trial court intensifies the effect of such prejudicial remarks; and a subsequent instruction to disregard remarks of counsel may not cure the injury already done.
5. After defendant's counsel has several times objected to such remarks which the prosecutor persistently continues to make, with the approval of the court, he need not continue to make objections to each remark, but the subsequent remarks will be held subject to the exceptions already taken.

Appeal from the Appellate Division of the Supreme Court of the Second Judicial Department for Kings County reversing 36 App. Div. 401.

Robert W. Fielding was indicted under section 165 of the Criminal Code for falsely auditing and paying claims, etc.

Charles J. Patterson, for the appellant.

Hiram R. Steele, for the respondent.

VANN, J. We think that the record before us is free from reversible error except as to a single question which is raised by the following extract from the appeal book, transcribed literally so that it may speak for itself.

The district attorney, in summing up, said: "Defendant changed his style of living from a frame house on Prospect avenue to a palatial residence on Eighth avenue, which every man knows cannot be maintained in the style of that neighborhood for less than ten thousand dollars a year." Objected to. The court: "There is no evidence of that." By the district attorney: "I appeal to the common sense of the jury." The court: "There is no other comment required than the statement of the fact that there is no evidence in the case as to how much it cost to maintain an establishment on Eighth avenue." By the district attorney: "There is no evidence, but you will not prohibit their using their experience, etc." In further summing up, he said: "Go and spend an hour in the tax collector's office the day after the tax levy is confirmed, and look at the long line —" Objected to by the defendant. The court: "I do not think this interruption is called for." By defendant's counsel: "I will take an exception if your honor will permit him to proceed on that line." The court: "I will hear what he says first." By defendant's counsel: "I ask to have it taken down. I ask you to stop him at this point, and take an exception." The court: "I cannot do both; I cannot have it taken down and have him stopped also. Proceed." By the district attorney: "I say, visit the tax office on the day after the annual taxes are confirmed, and look at the long line, that stretches out into and down the street, of people that are willing to stand there all day in order to save the little rebate which early payment secures.

Those people are the victims of the defendant's fraud." By defendant's counsel: "Does your honor permit him to proceed in this fashion," The court: "Yes." By defendant's counsel: "I will take an exception." By the district attorney: "This interruption is outrageous. Counsel should be instructed to take his exception when I have finished." By defendant's counsel: "Have I right to take it —" The court: "I do not think it is called for; that is all I can say. I can only say that I do not think these continual interruptions are called for." By defendant's counsel: "I have a right to take an exception." The court: "Yes, you have." By the district attorney: "But at a later time." By defendant's counsel: "I think not." By the district attorney: "The purpose is to break the effect of anything I might say to you. He knows it is improper." By defendant's attorney: "I do not." By the district attorney: "I say the people that you will find there in a line on that day are the victims of the defendant's crime. You will find there the widow, that has starved her brood of little children and seen their faces get pinched and haggard, in order that she might be sure that tax day should not find her with empty hands. It is that woman's money, coined out of her blood and the blood of her children, that the defendant has stolen and squandered. If you will indulge the pitiful sentiments of your hearts, think of her. Oh, there are unwritten tragedies of that sort enacted, not in the luxurious habitations of Eighth avenue, but behind the shabby front doors of poor neighborhoods. Look at the old man, standing in line, clutching in his knotted fingers his last year's receipt—" By the defendant's counsel: "Does your honor permit this? Is this in your ruling?" The court: "I am going to permit him to sum up his case." By defendant's counsel: "I ask you to stop him at this point about the descriptions of the old man with the knotted fingers." The court: "Proceed." By defendant's counsel: "I will take an exception." By the district attorney: "You ought to be ashamed." By defendant's counsel: "You ought to be ashamed of yourself to talk to a jury like this." The court: "I think it is perfectly proper, but there is nothing I can do to compel the attorney of the defendant to take the ruling of the court." By defendant's counsel: "Let him go on. I shall not interrupt him with another word. Let him

describe all the knotted fingers in the land." By the district attorney: "And the claque that stands behind the rail—" The court: "Proceed." By the district attorney: "I say you will see old men in that line clutching in their knotted fingers rolls of dirty one-dollar bills. Look at their worn and shabby garments; look at the marks of painful labor written all over their aged and clumsy limbs; it is the money of these people which the defendant has stolen and squandered. These are the people whose cause I plead. These are the victims of the defendant's crime. These are the people who now, by tens of thousands, are waiting outside for your verdict. Will you do them justice, or will you not? If you shall let this man, loaded with his guilty plunder, escape, then I say you have committed the unpardonable sin."

It did not appear that the defendants' counsel, by his method of summing up, incited these remarks on the part of the district attorney.

In charging the jury the court said: "Some things have been said about the newspapers, about popular clamor, and about the burden of the taxpayers. Those are conditions which are not to control or influence you in deciding this case. What the clamor may be, I do not know; I have never heard of it. What the newspapers may have said, I do not care; I have never read it. How much the people may or may not be burdened, no matter. If the times were prosperous, a public official has no right to make an assault upon the public treasury or to aid others in doing so, and he must be tried only for the crime he has committed, if he has committed one, and it would be wrong in the extreme to assume anything and allow it to weigh against this defendant because of hard times, or because of difficulties which the people who pay money into the city treasury may or may not have in acquiring the means of making the payment." Upon the request of the defendant he further charged: "That there is no evidence in the case which would justify the jury in finding that it was more expensive to live upon Eighth avenue than in Prospect avenue," and "they are not to consider any facts but those which have been proven by the witnesses or the exhibits."

We do not wish to express any views which would restrict counsel in fair argument, comment, or appeal. We object, how-

ever, to the assertion by the learned district attorney of facts not proved, to his inflammatory appeals to passion and prejudice, and to his threat to the jury of popular denunciation, all under the sanction of the trial court. If the record in this case is sustained by the deliberate judgment of the court of last resort, it is difficult to see the limit to intemperate language, unproved assertion or pernicious appeals on the part of counsel for the prosecution, except their own sense of propriety. The law, in our judgment, does not thus leave an accused person, presumed to be innocent until proved to be guilty, bound and helpless in the hands of his accuser.

Even in a civil action when counsel are permitted, under objection and exception, while summing up, to read to the jury an abstract from a pamphlet or newspaper, or to exhibit a cartoon, not in evidence, it is good ground for reversal. *Koelges v. Guardian Life Ins. Co.*, 57 N. Y. 638; *Williams v. Brooklyn Elevated R. R. Co.*, 126 N. Y. 96; *McKeever v. Weyer*, 11 Weekly Digest, 258. So statements made by counsel, outside of the evidence and subject to objection, which strongly tend to arouse sympathy, prejudice or resentment in the minds of the jury, require a new trial, even if the court charges that they have nothing to do with the case, and must be disregarded. *Halpern v. Nassau Elec. R. R. Co.*, 16 App. Div. 90; *Bagully v. Morning Journal Ass'n*, 38 App. Div. 522.

Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the people of the State, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment. By such a course, in the long run, he throws away much of his strength, because his violent and reprehensible language betrays his bias and finally weakens his influence with the jury. As was said by Judge Earl in *People v. Greenwall*, 115 N. Y. 520, 526, "the district attorney, representing the majesty of the peo-

ple, and having no responsibility, except fairly to discharge his duty, should put himself under proper restraint, and should not in his remarks, in the hearing of the jury, go beyond the evidence or the bounds of a reasonable moderation." Neither in that case nor in *People v. Brooks*, 131 N. Y. 321, 329, was any objection made or exception taken. In the former, which was a capital case, the court was not bound to interfere, while in the latter, which was an appeal from the general term, it had no power to interfere, without an exception. As the admonition of the court has not proved sufficient to prevent improper and dangerous appeals to the prejudice of jurors, it has become necessary, as we think, to rigidly enforce the general rule of this and many other States that requires a reversal whenever the error is raised by a proper exception.

Abuse of the defendant by the prosecuting officer in his address to the jury, which was calculated to arouse their passions against him and materially prejudice him in the trial, has been held such error as would, of itself, cause a reversal. *Stone v. State*, 22 Tex. Ct. App. 185. Where the prosecuting attorney was permitted to comment on the personal appearance of the defendant, not as a witness, nor on account of his manner and bearing as such, but as indicating a probability of guilt, it was deemed sufficient to reverse a judgment of conviction. *Bessette v. State*, 101 Ind. 85.

In *Tucker v. Henniker*, 41 N. Y. 317, 323, the court said: "It would seem utterly vain and quite useless to caution jurors, in the progress of a trial, against listening to conversations out of the court room in regard to the merits of a cause, if they are to be permitted to listen in the jury box to statements of facts calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous and interested counsel. . . . Statements of facts not proved and comments thereon are outside of a cause; they stand legally irrelevant to the matter in question, and are, therefore, not pertinent. If not pertinent, they are not within the privilege of counsel."

In *Laubach v. State*, 12 Tex. Ct. App. 583, the prosecuting attorney, when commenting upon the evidence in his closing argument, was interrupted by the defendant in person with the

statement that if he had certain absent witnesses he could show a different state of facts. Thereupon the attorney, addressing the jury, stated that a brother of the absent witnesses told him that they, if present, would testify against the defendant. Objection was promptly made to this remark, and the district attorney at once told the jury not to regard anything he or defendant had said. The judgment was reversed upon the ground, among others, that the remark was unwarranted by the law or the facts and was calculated to injure the rights of the defendant by prejudicing his case in the minds of the jury.

In *Brown v. Swineford*, 44 Wis. 282, 292, counsel, in summing up, commented upon the appellant's connection with a railroad company and his ability on that account to pay any judgment which might be rendered against him. The court reversed the judgment, and after referring to the adjudged cases remarked, "All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence or to assume *arguendo* such facts to be in the case when they are not."

In *State v. Smith*, 75 N. C. 306, the prosecuting attorney, addressing the jury, said: "The defendant was such a scoundrel that he was compelled to move his trial from Jones county to a county where he was not known." The conviction was reversed and the court said that "the purpose and natural effect of such language was to create a prejudice against the defendant not arising out of any legal evidence before them, for the jury were precluded from inquiry into the causes or motives for moving the trial, and even from the knowledge whether the trial was moved by the State or the defendant."

In *Rea v. Harrington*, 58 Vt. 181, 190, the court said: "It has been repeatedly held in other jurisdictions, and recently in this, that when counsel persistently travel out of the record, basing argument on facts not appearing and appealing to prejudice, irrelevant to the case and outside of the proof, it not only merits the severe censure of the court, but is valid ground for exception."

In *Newton v. State*, 21 Fla. 53, it was held that where counsel for the prosecution upon the trial of a cause before a jury, abus-

ing his privilege to the manifest prejudice of the defendant, makes statements with regard to evidence being adduced not pertinent, and therefore not within his privilege, it becomes the duty of the judge to stop him at once, and if he fails to do so and the impropriety is great it is ground for a new trial upon appeal.

In *Moore v. State*, 21 Tex. Ct. App. 666, the district attorney in his address to the jury said that the defendant had been convicted of the offense for which he was on trial "upon a former and previous indictment," and upon appeal it was reversed on a trifling technicality in drawing the indictment, and he urged the jury to give him such a term in the penitentiary as would make up for the great expense he had caused upon a mere technicality. The court in reversing the judgment said: "In many decisions this court has urged upon counsel, whose duty it is to prosecute the pleas of the State, to refrain from injecting into trials of cases of this kind any matter calculated to inflame the minds or excite the prejudice of the jury. If we could add anything to what has been said or could use any language calculated to reach the minds and consciences of those to whom such admonitions are addressed, we would avail ourselves of the present occasion to do so. As we cannot, we can only reverse and remand the case, in the hope that the accused may secure a fair and impartial trial, according to law and according to those methods alike ancient and honorable which still obtain in all enlightened courts."

See also as to the effect of a departure from legitimate course of argument the following cases: *Rudolph v. Landwerlen*, 92 Ind. 34; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Hall v. Wolff*, 61 Iowa, 559; *Bremmer v. Railroad Co.*, 61 Wis. 114.

In a case that is free from doubt upon the merits, the appellate court disregard errors of the trial court, even in a criminal case, when it is reasonably certain that they could not have affected the result. A proposition is reasonably certain when it is supported by the strong probabilities, but here the strong probabilities are that the errors did affect the result. The average man cannot read the eloquent but inflammatory language of the district attorney without being impressed by it, and it is safe to presume that the effect would be heightened by hearing those

words spoken with animation and enthusiasm under the exciting circumstances surrounding an important criminal trial. The jury might be told by the court to forget them, but could they forget them? They might be told to disregard them, but how can we be certain that they did disregard them? Moreover, some of the most objectionable language was not alluded to by the court in its charge, and instructions to the jury do not always neutralize, either as a matter of law or fact, the effect of improper remarks in their presence. *People v. Corey*, 157 N. Y. 332, 346; *Brooks v. Rochester Ry. Co.*, 156 N. Y. 244, 252; *People v. Hill*, 37 App. Div. 327; *Swan v. Keough*, 35 App. Div. 80.

From our observation of jurymen we think the language under consideration would be apt to turn their minds against the defendant, divert their attention from the evidence and prevent the exercise of sound and dispassionate judgment upon the merits. It brought before them vivid pictures of suffering and want, of wrongs done to the widow and orphan by the defendant, and of a multitude of people waiting outside the court-house for his conviction. The hardships of small taxpayers, the privations of the poor and the overwhelming influence of public opinion were urged against him, and he was described as a thief, living in a palace on the proceeds of public plunder. There was even an attempt to intimidate the jury by telling them that they would commit "the unpardonable sin" unless they convicted him. The cause of complaint by the appellant is not a single, inadvertent remark, which might well be overlooked, but after repeated objections improper statements were persisted in under the claim, sustained by the court, that it was right to make them.

The harsh and unjust statements of the district attorney were not founded upon evidence, but rested wholly on his unsupported declarations. The most of them would have been ruled out as immaterial or incompetent if evidence had been offered to show that they were true. They violated the reason upon which the law of evidence is founded by spreading facts before the jury without any proof, and virtually, also, the rule of evidence which prohibits immaterial and incompetent facts from being proved. There was no evidence that it cost \$10,000 a year to live in the style of Eighth avenue, where the defendant re-

sided, and when the point was raised the court so ruled. The district attorney, however, in disregard of the ruling, appealed to the common sense of the jury, and the court very properly tried to check him, but he was allowed to appeal to their experience without rebuke. After that he met with no attempt at restraint by the court. Whatever he said, whether it was about the widow starving her little children until their faces got pinched and haggard in order that she might pay the taxes stolen by the defendant, or about aged men, deformed by painful labor, whose money the defendant had squandered, met with the approval of the court. Instead of repressing these unfounded and dangerous assertions, when repeatedly requested to, at first he condemned the efforts of the defendant's counsel to prevent them, and finally pronounced the course of the district attorney "perfectly proper," and expressed regret that his ruling to that effect was not acquiesced in. Even the threat of popular denunciation and the attempt to frighten the jury by declaring that they would commit the unpardonable sin if they found for the defendant, met with neither remonstrance nor reproof. The language of the prosecuting officer, thus indorsed by the highest authority known to the jury, must have gone home to their minds with powerful and convincing effect, while the counsel for the defendant was left in the attitude of a wrong-doer, trying to disturb the proceedings of the court. After persisting in his efforts to protect his client until the court held that he was out of order, he was not obliged to run the risk of punishment for contempt by continuing to object, for all that was said by the district attorney after the court had taken this position should be held subject to the exceptions already interposed. The court should even allow an exception upon appeal where counsel were prevented from excepting at the trial. Moreover, the objections taken were to the general course pursued by the district attorney, and when the court had sanctioned this, no further objection or exception was necessary. This method of summing up should have been sternly interrupted by the court of its own motion, so as to exclude improper statements and comments from the consideration of the jury, for objections made after the district attorney had said what he wanted to were objections made after the harm was done.

After what took place during the summing up, how can we be sure that the general and placid language of the charge wholly counteracted the pointed and vigorous words of the district attorney, indorsed as they had been by the court itself? When improper evidence has been received or improper statements made in the presence of the jury, if the court seeks to correct them, the correction should be as broad as the error, and cover substantially the same ground, as was the case in *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, decided at the present term. The court in its charge said nothing about the improper appeals to sympathy, prejudice or passion, the starvation of children by their widowed mothers, the knotted fingers and bent forms of old men, the denunciation of the defendant as a thief, or the bugbear of the unpardonable sin held up before the jury so forcibly. The correction did not cure the errors, because it did not go far enough and was not sufficiently clear and specific. It did not repel the presumption of injury. *Coleman v. People*, 58 N. Y. 555, 561; *People v. Gonzales*, 35 N. Y. 49, 59.

Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law, because he has not had the fair and impartial trial which the law prescribes for a person charged with crime. If we disregard a sound and well-established rule in this case because we think he is guilty, we tear down one of the safeguards provided by society for the protection of its citizens, and the precedent may, at some time, aid in depriving an innocent man of his liberty or his life.

The judgment should be reversed and a new trial ordered.

HAIGHT, J. (dissenting). The indictment, under which the defendant was convicted, was founded upon section 165 of the Penal Code. The affirmance by the appellate division was unanimous, thus disposing of the questions of fact. We have carefully examined the exceptions taken with reference to the admission and rejection of evidence, and are of the opinion that they were properly disposed of by the court below.

There is only one question which we think it our duty to discuss upon this appeal, and that pertains to the remarks of the

district attorney who tried the case, which have been quoted in the prevailing opinion.

The privilege of counsel in addressing a jury has often given rise to controversies which have been the subject of consideration in our courts, as well as in the courts of our sister States. In 56 American Reports, 814, and 58 American Reports, 648, will be found notes, in which many of the cases are collected and digested. There is one case to which we will specifically refer, for it expresses our views upon the subject, and that is the case of *Williams v. Brooklyn Elevated Railroad Co.*, 126 N. Y. 96, 102. In that case, Andrews, J., in delivering the opinion of the court, says: "It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense. The right of counsel to address the jury upon the facts is of public as well as private consequence, for its exercise has always proved one of the most effective aids in the ascertainment of truth by juries in courts of justice, and this concerns the very highest interest of the State. The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal in advocating his cause. This privilege is not beyond regulation by the court. It is subject to be controlled by the trial judge in the exercise of a sound discretion, to prevent undue prolixity, waste of time, or unseemly criticism. The privilege of counsel, however, does not justify the introduction in his summing up of matters wholly immaterial and irrelevant to the matter to be decided, and which the jury have no right to consider in arriving at their verdict. The jury are sworn to render their verdict upon the evidence. The law sedulously guards against the introduction of irrelevant or incompetent evidence, by which the rights of a party may be prejudiced. The purpose of these salutary rules might be defeated if jurors were allowed to consider facts not in evidence, and the privilege of counsel can never operate as a

license to state to a jury facts not in evidence, or to present considerations which have no legitimate bearing upon the case and which the jury would have no right to consider. Where counsel in summing up proceeds to dilate upon facts not in evidence or to press upon the jury considerations which the jury would have no right to regard, it is, we conceive, the plain duty of the court, upon objection made, to interpose, and a refusal of the court to interpose, where otherwise the right of the party would be prejudiced, would be legal error."

The district attorney is a high public officer, representing the State, which seeks equal and impartial justice, and it is as much his duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence he is, as we have seen in the case alluded to, given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider. Verdicts obtained through duress, bias or prejudice are illegal, and will be set aside. This is also true with reference to verdicts based upon popular clamor.

Upon referring to the comments of the district attorney, it appears that he proceeded to draw pictures based upon matters outside of the evidence, of a widow with her starved brood of little children with faces pinched and haggard, and an old man clutching in his knotted fingers rolls of dirty one-dollar bills, standing in line of taxpayers all day in order to save the little rebate which early payment of their taxes secures. He then says: "These are the people whose cause I plead," and then states that "these are the people, who now, by tens of thousands, are waiting outside for a verdict. Will you do them justice, or will you not? If you shall let this man, loaded with his guilty plunder, escape, then I say you have committed the unpardonable sin." As we understand this language, the district attorney demands of the jury a verdict of guilty based upon the clamor of tens of thousands who are waiting outside, and insists that if the jurors do not comply with his demand they will commit the unpardonable

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sin. This, we think, was going too far, and cannot be approved. He departed from his line of duty, which was a discussion of the evidence and a demand of a conviction based thereon, and appealed to the jury for a conviction upon considerations which had no legitimate bearing upon the case, and which the jury had no right to consider.

We, however, are inclined to the view that a new trial is not required. Under the constitution we are limited in our review to questions of law. The defendant's counsel took a number of exceptions to the statements made by the district attorney, but when he came to his last and final statement, in which the real vice occurred, the defendant's counsel neglected to take an exception. That which preceded the final remarks of the district attorney may not have been in good taste, but we do not regard it, standing alone, to be such a departure from the line of discussion permissible within the privilege of the district attorney as to warrant a reversal. We regard the question very much relieved by the charge of the court, who, after listening to the comments of the district attorney, says: "Some things have been said about the newspapers, about popular clamor, and the burden of the taxpayers. Those are considerations which are not to control or influence you in deciding this case. What the clamor may be, I do not know; I have never heard of it. What the newspapers may have said, I do not care; I have never read it. How much the people may or may not be burdened, no matter. If the times were prosperous, a public official has no right to make an assault upon the public treasury, or to aid others in doing it, and he must be tried only for the crime he has committed, if he has committed one; and it would be wrong in the extreme to assume anything and allow it to weigh against this defendant because of hard times, or because of difficulties which the people who pay money into the city treasury may or may not have in acquiring the means of making the payment." The court further charged: "There is no evidence in the case which would justify the jury in finding that it was more expensive to live upon Eighth avenue than in Prospect avenue; that no unfavorable inference can be drawn in this case against the defendant from the fact that in the month of September, 1897, he moved from Prospect avenue into Eighth avenue."

Under section 542 of the Code of Criminal Procedure we are required to give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties. Under the circumstances, therefore, we think the judgment and conviction should be affirmed.

PARKER, C. J., BARTLETT and MARTIN, JJ., concur with VANN, J., for reversal of judgment of conviction, etc.; GRAY and O'BRIEN, JJ., concur with HAIGHT, J., for affirmance.

Judgment of conviction reversed and new trial ordered.

NOTE (by H. C. G.).—The case of *People v. Fielding*, *supra*, is especially important for emphatically announcing the very reasonable doctrine that when the prosecutor persistently continues his remarks after the defendant's counsel has several times objected, only to be admonished by the court that he is interrupting the prosecutor, that it is unnecessary for him to except to each improper remark, but that the court will consider them all as excepted to. This should be the rule everywhere, because the defendant's counsel, being compelled to take frequent exceptions with an adverse court, is made to appear in a bad light before the jury,—as an interrupter of the proceedings, as an obstructionist, and as though he were afraid of discussion; all of which phases are generally exploited by the prosecutor in the heat of his argument.

STATE V. TRAUGER.

Supreme Court of Iowa—77 N. W. Rep. 336.

Decided December 14, 1898.

ARGUMENT OF COUNSEL: *Prejudicial remarks—Defendant before grand jury.*

1. The fact that the accused was brought before the grand jury without his consent is not reversible error, when it appears that he was cautioned that he need not make any statement, and that thereupon he expressed a desire to testify.
2. It is reversible error for the prosecuting attorney to say, "If a man comes to me, and says, 'Ross, your garment is a stolen garment,' I think I'll show him where I got it. I will call in Mr. Olson, and show that he made it. That accused man ought to be honest to society, and if we have a chain, and put it around you, and fasten it, and all you have to do is to reach in your pocket and get an instrument and snap it asunder, you ought to do it;" because it brings to the attention of the jury the fact that the defendant had not testified in his own behalf; also it assumes that guilt is admitted by a failure to disprove any fact.

Appeal from the District Court of Monona County; Hon. J. F. Oliver, Judge.

Conviction for burglary. Reversed.

George A. Oliver, for appellant.

GRANGER, J. 1. The defendant was in confinement in the county jail of Monona while the charge was pending before the grand jury, and, at the instance of the grand jury, he was brought before it, and while there he was examined as to the charge, and his testimony is in record, and in no ways tends to his crimination. After the indictment was returned, defendant moved to quash on the ground of his being so brought before the grand jury and examined. It clearly appears that he was not taken before the grand jury at his request, but it does appear, very satisfactorily, that, when before the grand jury, he was told by the county attorney that he was not compelled to come there, nor to make any statement unless it was of his own free will, and he believed it to his interest to do so; and he was asked if he understood it, and he answered that he did, and said: "I want to tell it, because I know just where I got the satchel. I bought it of a tramp, and I want to make my statement before the grand jury." George A. Oliver had before been appointed by the court to defend for him, and he (the attorney) had no notice of his presence before the grand jury. The proceeding seems entirely free from intentional wrong, it appearing that the county attorney had no notice of it until he came into the grand jury room and found defendant there, and, before he was examined, gave him the information above stated. Affidavits of grand jurors fully substantiate the statement of the county attorney as to the information given the defendant, and his expressed desire to make his statement. It is true that he states otherwise, but the fact fully appears. It is conceded that defendant could properly be before the grand jury at his own request. Nothing that we here say should be construed otherwise than as an unqualified disapproval of the act of the grand jury in bringing the defendant before it, on its own motion. The information given the defendant, when before the grand jury, and before he made any statement, fully apprised him of his right to retire, and that, if he made a statement, it must be be-

cause he desired to do so, in his own interest. In view of such information, and of his expressed desire to make the statement he did make, we think the case stands as if he had been brought before the jury on his own request for that purpose. It in no way appears that, up to the time he had the information and expressed the desire, he had been prejudiced. In fact, the contrary appears. It was not error to refuse to quash the indictment.

2. The county attorney in his opening argument to the jury made use of the following language: "If a man comes to me, and says, 'Ross, your garment is a stolen garment,' I think I'll show him where I got it. I will call in Mr. Olson, and show that he made it. That accused man ought to be honest to society, and if we have made a chain, and put it around you, and fasten it, and all you have to do is to reach in your pocket and get an instrument and snap it asunder, you ought to do it." The following is section 5484 of the code: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the State; and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the State during the trial refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys shall be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial." Whether or not the language used amounts to a reference to the fact that defendant did not testify in his own behalf—inasmuch as it does not in terms do so—depends on what the jury might reasonably understand from its use. The object of the statute is to keep such fact from the minds of the jurors, and thus avoid prejudice on account of it. The first part of the statement, as to the garment, may be said not to refer to defendant; but what other application can be put on the other part? It commences, "That accused man." What accused man? That it has a different reference from the first part is clear, for there he is himself the accused man. In the latter part he says: "And if we have made a chain, and put it around you, and fasten it, and all you have to do is to reach in your pocket and get an instrument and snap it asunder, you ought to

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do it." Whether this was addressed to the defendant, or to some one whom the attorney, to illustrate, assumed to be accused, the understanding from the language is the same. It means, when given application to a criminal trial, that when a chain of circumstances is woven around a defendant, and he has the means present with him to break the chain, he should use such means, and the inference is that, if he does not, it is a circumstance against him. We think no juror would listen to such a statement, in a case where a defendant had not been a witness, and fail to understand that it meant that, if the defendant could deny the facts proven against him, he would take the witness stand and do it. In the first part of the statement reference is made to evidence to be obtained from others, while in the last part reference is made to what the accused has, as, if he has nothing more to do than take an instrument from his pocket and snap the chain asunder, he should do it. The State of Missouri has a statute quite similar, providing that, in such a case, the fact of not testifying shall not "be referred to by any attorney in the case." Rev. Stat. 1889, § 4219. In the case of *State v. Mozley*, 102 Mo. 374, 14 S. W. Rep. 969, the prosecuting attorney used the following language: "They have offered not a word to explain or show how that woman came to her death. Not a neighbor was put upon the stand, if I am right,—man, woman, or child, kinsman or stranger,—to show what he said had caused her death, gentlemen. Instead of hunting up an explanation made by him to his neighbors,—or, if they ever made an effort, they never produced the result of that effort in the court. There they are, alone,—she in perfect health; and in the night-time she comes to her death suddenly. We say that common honesty, common decency, require, at the hands of that man, when he sees his neighbors, to tell how she came to her death. I don't care whether innocent or guilty. If guilty, he goes to work to make up a story; if innocent, he tells the truth. The neighbors expected it of him. Your neighbors would expect it of you; and, gentlemen, you would expect it of yourselves." In that case the court, after defining the words "referred to" as meaning "alluded to," said as follows: "If the object of the statute was to prevent the jury from considering the fact that a defendant has failed to testify, it is easy to see that

as much could be accomplished to defeat that object by an allusion to such facts as by reference thereto. The language of which complaint is made was simply an adroit and insinuating attempt indirectly to accomplish what could not have been accomplished by a direct statement. The statute does not permit such evasions of its manifest purpose." The language in that case is not as clearly violative of the statute as is the language in this case. It may be well to also state, as this is a criminal case, that the language used does not meet the letter or spirit of the law in a criminal case. It violates the rule substantially announced in all criminal trials, that the defendant is presumed innocent until guilt is established by the State. Guilt is not to be presumed from a failure to disprove any fact. No conviction could rest under an instruction announcing a rule like that involved in the statement of the county attorney. A new trial was asked because of the language used by the county attorney, and it was error to refuse it. Reversed.

PICKETT V. STATE.

Texas Court of Criminal Appeals—51 S. W. Rep. 374.

Decided May 31, 1899.

ARGUMENT OF COUNSEL: *Error to refer to previous trial of same case.*

The provision of the statute which reads: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt; nor shall it be alluded to in argument," is mandatory; hence it is reversible error for the prosecuting attorney, in his argument, to state to the jury, "the defendant has been three times tried and once convicted."

Appeal from the District Court of Brown County.

G. W. Pickett, being convicted of manslaughter, appeals.

Robert A. John, Assistant Attorney-General, for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; and he appeals.

We have examined all of appellant's assignments of error, and, in the view we take of this case, it is only necessary to discuss one of them. Appellant's bill of exceptions No. 8 complains of the action of the district attorney in his opening argument to the jury, in that he used the following language, to wit: "Cliff Westerman says that he never told any one of the threats made by Foster until after defendant was convicted. Ah! then was the time to dig this evidence up, and they dug it up." To which defendant excepted, and the district attorney proceeded with his argument, without any statement being made by the court. And T. C. Wilkinson, private prosecutor, in his closing address to the jury, said: "The defendant has been three times tried, and once convicted." To which statement the defendant excepted. The court charged the jury in reference to this matter as follows: "The remarks made by the prosecution, that defendant had been once before convicted, will not be considered by you for any purpose." Article 823 of the Code of Criminal Procedure provides: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." Judge White, in delivering the opinion of the court in *Hatch v. State*, 8 Tex. App. 420, uses this language: "There can be no mistake as to the meaning of the words used, or the intention of the legislature in prescribing that upon a second or new trial in a criminal case a former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument. Men are oftentimes convicted illegally, and in contravention of some important right conferred by law; and it would be not only unjust, but inhuman, to claim that such conviction should weigh a single particle in the estimation of their guilt upon another trial. The fact that the former conviction has been set aside and a new trial awarded, even if done upon grounds merely 'technical,' or upon grounds which, in the estimation of some, may appear 'foolish,' does not in the slightest alter the rule, or the reason of the rule." Ever since the decision in the above-cited case, this court has uniformly held that the fact of a former conviction shall not be alluded to in the argument of the case by the prosecution, and yet we find in this case that it

was done in two several instances by the prosecuting attorneys. The statute above quoted is mandatory. We have no inclination or power to disregard its beneficent provisions. We are constrained to reverse this judgment because of the violation of a plain and positive provision of the statutory law of this land. *House v. State*, 9 Tex. App. 567; *Moore v. State*, 21 Tex. App. 666, 2 S. W. Rep. 887.

The court's charge, together with the requested charges given, cover the law of this case. For the error discussed, the judgment is reversed, and the cause remanded.

PEOPLE V. SMITH.

121 Cal. 355—53 Pac. Rep. 802.

Decided July 1, 1898.

ARGUMENT OF COUNSEL: HOMICIDE: *Venue—Use and scope of a deposition—Plea of once in jeopardy.*

1. Although no witness expressly testified as to venue, yet it may be regarded as proved where it sufficiently appears from all of the evidence taken together.
2. Such proof may be gleaned from a deposition taken at an inquest, and which was used at the trial without objection, although it was introduced for a different purpose. When once in evidence it was competent evidence for any legitimate purpose.
3. A defendant may waive the incompetency of evidence, by failing to object to it on that ground.
4. If a defendant pleads both once in jeopardy and not guilty, and the former is found against him, and there is a disagreement as to the latter, on a new trial it is not necessary to retry the former issue; but if the defendant desires to avail himself of any errors in the trial of the former plea he may assign them when he makes his motion for new trial on the verdict of guilty.
5. It is highly improper for the district attorney to argue to the jury that because the defense did not call a certain witness alleged to have been present at the homicide, that therefore the presumption of law is that his testimony would have been adverse to the defense; and to tell them that such witness had been subpoenaed by the defense.

Appeal from the Superior Court of Kern County.

The facts appear in the opinion.

W. F. Fitzgerald, Attorney-General, and Henry E. Carter,
Deputy Attorney-General, for the People.

J. W. Ahern and J. W. Laird, for the appellant.

VAN FLEET, J. Defendant was convicted of manslaughter for the killing of one Emelio Bencomo, in the county of Kern, and was adjudged to suffer imprisonment in the State prison for the term of ten years. He appeals from the judgment and from an order denying him a new trial.

1. Appellant's first contention is that there was no evidence to prove venue. But this objection is not sustained by the record. It is true, as appellant urges, that no witness was asked the direct question, nor testified in so many words, that the killing took place in Kern county; but this was not essential if the fact otherwise sufficiently appeared. Appellant contends that the only evidence touching upon the question was contained in the deposition of the witness Miller, taken at the coroner's inquest; that this deposition was introduced at the trial for another purpose, and was not competent or admissible to prove venue. The deposition was introduced and read in its entirety without objection, and while the primary purpose of its introduction was apparently other than to establish the venue, the purpose was not limited, and, being in evidence, could be regarded in aid of any fact which it intended to establish. A defendant may waive the objection that evidence is incompetent, and a failure to object to it on that ground is such waiver. But, independently of the deposition, there was evidence sufficient to show that the offense was committed in the county of Kern. All of the witnesses refer to and designate the place where deceased was shot and killed as being at "Scodie's store," and it incidentally appears in the testimony of several of the witnesses, and without conflict, that this store was in the town of Onyx, in Kern county.

2. At the first trial of the case in February, 1897, the defendant, with his plea of not guilty, introduced the plea of "once in jeopardy." As a result of that trial the jury returned this verdict: "We, the jury impaneled to try the above-entitled cause, find for the People upon the plea of once in jeopardy, introduced by defendant, that is, we find that he has not been in jeopardy. James Curran, Foreman."

But upon the plea of not guilty to the charge laid in the information the jury announced that they were unable to agree upon a verdict, and were discharged. Subsequently, in May,

1897, the cause was tried a second time. The record does not disclose whether the issue raised by the plea of jeopardy was again submitted to the jury upon this second trial, or that any evidence was offered in support thereof; but the jury returned a verdict convicting defendant of manslaughter, without any mention of the special plea. Thereupon the defendant made a motion for a new trial, but made no mention therein, nor in his bill of exceptions, of said plea of jeopardy, or any assignment of error based thereon or growing out of the trial thereof, in any way. His motion was denied and judgment entered against him, which constitute the order and judgment from which this appeal is prosecuted.

It is now urged that defendant was entitled to have his special plea again submitted to the jury on his second trial, and to a verdict thereon at their hands, and that the judgment could not competently be entered against him without such finding. In other words, appellant's position is that the verdict of the jury upon the issue at his first trial, by reason of the failure to find upon the question of guilt, went for naught, was wholly nugatory, and should not have been received—apparently upon the theory that, as no final judgment of conviction could be entered upon such verdict, no appeal would lie therefrom, nor any opportunity be afforded to the defendant to have the trial of that issue reviewed; and consequently that that issue should now be regarded as if never tried.

But this objection is determined adversely to the position of the appellant by the case of *People v. Majors*, 65 Cal. 138, 148, 52 Am. Rep. 295. In that case the defendant, under an indictment for murder, had been previously tried upon the plea of "former conviction," and a verdict found against him thereon; subsequently he was placed on trial under the same indictment, upon his plea of not guilty. At this second trial he asked to be permitted to again interpose the special plea, but this was refused, and the refusal was assigned as error. The objection was briefly answered in this court by the obvious suggestion that "the defendant had been tried on his plea of former conviction, and it was not the duty of the court to grant him another trial on that." Upon reason and principle this must be so. Why should a defendant be entitled to a second trial of such an issue

any more than that of guilt—except for error? But it is said that it was error to receive such partial verdict; that the contemplation of the statute is that the pleas of the defendant shall be tried and determined together. It is true that such is the more usual, more expeditious, and more desirable mode of trying criminal cases; but there is nothing in the statute, nor any reason, imperatively demanding that course. A plea of this character is in no way dependent upon, or interwoven with, that of “not guilty,” but is separate and apart therefrom; and there is nothing, therefore, in the nature of things precluding the idea of trying it separately. The defendant had a verdict in response to both his pleas before final judgment was entered, and that was all he was entitled to.

But it is said that in such case defendant can have no opportunity to have reviewed any error occurring in the trial of his special plea. This is refuted by the ruling in the *Majors Case*, above referred to, and by the provisions of the statute. The fact that the special plea has been tried first, no matter how long before the question of guilt is determined, does not preclude a defendant from moving for a new trial for any error arising therein. As suggested in the first appeal in *People v. Majors*, 65 Cal. 100, the statute does not contemplate a motion for a new trial until all the issues of fact have been tried. When those issues have been determined, and before final judgment is entered, the defendant has his motion for a new trial, upon which may be assigned and reviewed the errors, if any, occurring in the trial of any or all of the issues. That was the course pursued and recognized in *People v. Majors*, first above cited (65 Cal. 138), and to our minds a perfectly proper and logical one.

3. The most serious exception in the case is that based upon certain statements of the district attorney made in his closing argument to the jury, and the ruling of the court thereon. The evidence disclosed that there were present at the time Bencomo was killed but four persons other than deceased—the defendant, his brother, John Smith, one Porfirio Tapia, and a lad named Harvey Mills. John Smith, the brother, was informed against jointly with defendant for the murder of the deceased, but prior to the trial had, on motion of the district attorney, been ordered discharged. Whether he had in fact been discharged, or was

for some reason still in custody at the time of the trial, the record does not disclose. It was suggested at the argument that he was yet in custody, but there was no evidence to show that such was the fact. There is nothing in the record to show that he was present at the trial or in the county, or even within reach of the process of the court at that time; and he was not called as a witness. Tapia and Mills were the principal witnesses for the State; they testified at the trial that the deceased was shot and killed by defendant, and they gave their version of the details of the shooting. There was evidence, however, on the part of the defense tending more or less strongly to impeach the testimony of these witnesses, by showing that they had both theretofore made statements at variance with their evidence, to the effect that, while they were near the place of the shooting at the time it occurred, they did not see it, nor know who did it; in fact it was shown that they had testified substantially to that effect before the coroner at the inquest on the body of deceased, and again at the preliminary examination of the accused. The defense was that the defendant did not commit the act; and in support of this defense the defendant testified that he was going to or standing by his horse at some distance from and with his back to the deceased at the time the shots were fired; that he heard the shots, but did not do the shooting, nor see who did it; that when he started to go to his horse he left his brother John and the deceased in conversation, and that when he returned to where the deceased was lying after the shots were fired his brother was still there, and told him that deceased had shot himself.

We are not to judge of the probabilities of this defense, nor of the case made by the prosecution; those were questions exclusively for the jury. But the defendant was entitled as of right to have the question of his guilt determined solely upon the evidence placed before the jury, and this right it is claimed was denied him by what follows. During his closing argument the district attorney stated to the jury: "There was prese it at that shooting Gonzales Smith, John Smith, Tapia, Harvey Mills; and Emelio Bencomo was killed. Now, sir, Mr. Tapia and Mr. Harvey Mills came on this stand and told you the story of the shooting. Mr. Gonzales Smith comes on to that stand, the de-

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feudant, and denies the story as given by those two men. Now, sir, I say, 'Where is John Smith?' At this point the defendant interposed this objection: "If your honor please, we object to the district attorney commenting on the fact that John Smith was not called as a witness by the defendant, and we ask the court to instruct the district attorney that he has no right to comment on that to the jury."

"The district attorney: 'That is just exactly the proposition I propose to talk to you about, and you gentlemen can see the defense is afraid of it or they never would have squealed.' The defendant again objected to the remarks of the district attorney as improper, and asked for a ruling of the court on this objection. The court ruled that 'the district attorney can comment on the fact, if he desires to.' To which ruling the defendant excepted. Thereupon the district attorney further stated to the jury: 'The presumption of the law is that, if John Smith had testified before you gentlemen as to the facts in this case—the presumption of the law is that his testimony would have been adverse to the defense.' To this statement the defendant objected as improper, and asked a ruling of the court.

"The court: 'Let the district attorney proceed with his argument.'

"The defendant's attorney: 'Note an exception.'

"The district attorney: 'He was subpoenaed as a witness on the part of the defense, and not put on the stand.'

"The defendant's attorney: 'Note an exception to the remark of the district attorney commenting on something that is not in evidence.'

"The court: 'You have got the benefit of the objection, on this particular line of the district attorney's argument, and don't interrupt him any more.'"

It is hardly necessary to say that these statements by the district attorney were under the circumstances wholly unauthorized and highly improper; and that the overruling by the court of defendant's objections thereto was error. Nor can we avoid the conclusion that the error was one calculated to greatly prejudice the defendant's case. There was, as we have seen, no evidence to warrant the fact stated by the district attorney in the remarks quoted, nor the unfavorable inference deduced therefrom; and

yet the court by its rulings implicitly told the jury that both the statement of facts and the deduction made by the district attorney therefrom were proper matters for their consideration. If the jury acted in the belief, as presumptively they did, that John Smith was not called by the defendant because he knew that his evidence would be against him, the consideration could but hear heavily against the degree of credence they might otherwise, and in view of the strong impeachment of the main witnesses of the prosecution have given the case of the defendant; since it appeared without conflict that John Smith was an eye witness of the affair, and therefore, presumably, knew the truth as to whether the deceased was killed by the defendant or shot himself. The error was, therefore, a material one, and for it the case must be reversed. The rule is universal that it is error to permit counsel, against objection, in argument before the jury, to make statements of, or comments upon, facts not in evidence; and, unless the court can see clearly that the error was as to some matter which could not in its nature have prejudiced the defendant's case, the judgment will be reversed. *People v. Mitchell*, 62 Cal. 411; *State v. Hatcher*, 29 Oreg. 309.

We find no other error in the case; the action of the court in modifying the instructions complained of was proper, and its rulings upon evidence correct.

For the error above pointed out the judgment and order are reversed and the cause remanded.

GABOUTTE, J., MCFARLAND, J., HARRISON, J., HENSHAW, J., and TEMPLE, J., concurred.

NOTES ON ARGUMENT OF COUNSEL (by H. C. G.).—Because of the general practical importance of the subject of "Argument of Counsel" in criminal cases, it has been deemed advisable to collect some of the many important decisions in which reversals have been ordered because of abusive, inflammatory, sinister, scurrilous, reckless, demagogic, unjust, and generally uncalled for and improper remarks and appeals to juries by public prosecutors. It is unnecessary to give cases where remarks were held not to be ground for reversals, as that is in the nature of a negative, and would swell the notes without advantage. The object is not to suggest what ought to be said, for that is a range well nigh infinite, which must be guided by a spirit of prudence under the circumstances of each case, but rather to point out what ought not be said.

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The reason of the rule placing limitations upon the arguments of counsel before juries has been aptly stated in the following cases.—In *Tucker v. Henniker*, 41 N. H. 317, the court said that the largest and most liberal freedom of speech is allowed, and that the range of discussing the merits of the case is unabridged; that counsel may descant upon the facts proved or admitted in the pleadings, or arraign the conduct of parties; may impugn, excuse, justify or condemn motives, so far as they are developed in evidence, and assail the credibility of witnesses. "His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination." But that: "It is irregular and illegal for counsel to comment upon facts not proven before the jury, as true, and not legally competent and admissible in evidence."

In *Brown v. Swineford*, 44 Wis. 232, the doctrine was very clearly and forcibly set forth: "It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in the case. But he has neither the duty nor the right to appeal to prejudices, just or unjust, against his adversary, *dehors* the very case he has to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside the proof." According to this opinion, one reason for holding counsel strictly to matters of record is, that while the trial judge may instruct the jurors to consider only the evidence legally before them, it is not certain that they will always do so; for, not taking written notes of the evidence, they sometimes may not discriminate between the evidence actually given and the statements and conclusions of counsel as to outside facts, and thus be prejudiced.

In *Mitchum v. State*, 11 Ga. 615, in which the prosecutor in answer to a statement of defendant's counsel that one Ellands, a witness, was locked up on the Sabbath before the trial, with the prosecutor and father-in-law of the deceased, and that he was a willing and bribed witness, said to the jury that Ellands was an *unwilling witness and had refused to come, and was brought by arrest under attachment*, none of which was in evidence. The Supreme Court held the remarks improper, and discussed at length the duties and limitations of counsel in argument, and the policy of the law relating thereto. They went back to the Magna Charta for its foundation, claiming that it was only by a well-defined policy in regulating the arguments of zealous counsel that the guaranty of a fair and impartial trial could be preserved. They descant upon the high position and influence of the English and American bars, and their unequalled power in maintaining popular rights, and the integrity of the individual. That justice can only be

administered by having methods of certainty in ascertaining facts, and that a juror, even, cannot lawfully use his own personal knowledge of facts pertinent to the trial, but must be sworn and depose as a witness; and they ask what kind of justice would result, if counsel were to descend to a combat of statements and contradictions and unproved facts. If allowed to men of high honor and veracity, it must be allowed to all, and the practice would turn the course of justice into confusion, uncertainty and injustice.

That it is necessary to preserve the honor and integrity of the bar itself that such limitations should be imposed, and that "where counsel are permitted to state facts in argument and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied."

Accusing defendant of prior crimes before evidence is heard.—At the first opening to the jury, before evidence was given, the district attorney made these statements: "The defendant committed a crime in the old country—in Germany,—and fled from justice. He engaged passage in one ship and then in another. He landed in this country, and went to Philadelphia, committing a crime there. He admitted that he knocked a hole in a man's head in the old country, and by his admission fled and committed a crime in Philadelphia,—a crime on one of the citizens of this country." The court overruled objection to these remarks, saying that he permitted them as far as to state the previous history of the defendant, though he suggested that because he committed one crime it was no evidence that he committed the one for which he was to be tried. The district attorney continued,—"he assumed another man's name. He obtained money under false pretenses;" with reiterations. At the close the judge instructed the jury not to regard any such statements, as they were not in the case. The court held that this instruction did not cure the error nor undo the wrong already done. That such statements would have been incompetent if offered as evidence under oath, and were much more improper when urged through the authority of the prosecutor, "and produced a greater and more lasting effect." "These remarks of the district attorney, so grossly improper, unprofessional, and unjust, and so repeated and assented to by the jury, when their minds were entirely free from bias, prejudice or partiality, and when they had no knowledge or opinion of the defendant or of the merits or demerits of his prosecution, and before they had heard any evidence, and when they were bound to presume him innocent, must have produced an ineffaceable and permanent impression. After hearing the recital of these crimes charged to have been committed by him, and that he was yet a fugitive from justice, their suspicions were aroused, and in their minds the probability of his guilt in the present case was already established, and they were ready and in a fit mood to construe every fact and circumstance in the evidence that was afterwards produced, and resolve all doubts, against the prisoner at the bar. Then, after all the evidence is given and their opinions were forming or already formed—whether from the evidence alone, or from the evidence corroborated and strengthened

by these terrible charges of the district attorney, they could not tell,—and after the court had said in their presence, directly in connection with those charges of previous crimes, 'I suppose the previous history of the defendant may be given,' what avail was it for the court to instruct the jury that they need not regard any statement of the district attorney that the defendant committed a crime in Germany, etc.? They had already regarded it. It was fastened upon their minds, and was mingled with the testimony, past the possibility of separation, and it had been weighed with the testimony in those nicely balanced scales which are made so easily to preponderate. The statements had been deliberately made, and they were approved by the court. It was too late, at the end of the trial, to correct the error. Their full effects upon the minds of the jury had been produced in prejudicing them against the prisoner, and unfitting them for an impartial hearing of the evidence and trial of the case. What though they were told by the court that 'the fact that the defendant committed *one crime* was no evidence that he committed this?' This language of the court came very near sanctioning the charge made by the district attorney, or taking it as true. It was enough that the defendant came before the jury for trial for this crime, already guilty of several other crimes, by the solemn and deliberate statement of this high and impartial officer of the State and of the court. "It was impossible that he should have a fair and impartial trial after this."

Also, on the trial, referring to a witness for the State who did not respond when called, the prosecutor remarked, "Perhaps somebody has got hold of him;" and upon the court remarking that absence of the witness did not suggest "tampering," the prosecutor exclaimed, "I will prove it before I get through." He did not even attempt to prove any "tampering" with the witness. This was condemned as being improper and unfair and in line with "his preceding unwarrantable and reprehensible assault upon the defendant's previous character." *Sasse v. State*, 68 Wis. 530.

Theatrical performances by prosecutors.—Near the conclusion of the trial, the prosecuting witness, in a seduction case, was recalled to the stand, taking her child with her. The court says: "While there, upon objection being made to her having the child with her, she testified that she had been directed by one of the State's Attorneys to so take the child; and it appears that this was done solely for the purpose of exhibiting the child to the jury, and of exciting prejudice against the defendant, and we are of the opinion that such action was sufficient to entitle the defendant to a new trial. Reversed."

Dunbar, C. J., in a separate opinion says: "I also concur in the last point decided by Judge Scott, as I am opposed to any theatrical manifestations in the trial of a cause, especially in the trial of a criminal action." *State v. Carter*, 8 Wash. 272, 36 Pac. Rep. 29.

Error for prosecutor to read to the jury, and comment thereon, the affidavit of the defendant previously made for a continuance.—A defendant, in an affidavit for continuance at a prior term, gave the names of several absent witnesses and what he expected to prove by them. These witnesses were not produced at the trial, and the district attor-

ney was allowed, against the objection of the defendant, to read the affidavit and comment thereon, and the jury took it with them to their room,—it never having been admitted or offered in evidence. The court says: "It seems this was clearly error. The affidavit was no part of the evidence in the case, and should not have been referred to or used as such, or permitted to go to the jury without first having been regularly admitted, if competent, as evidence, and defendants given an opportunity to make any explanation they may have desired as to the absence of these witnesses, or any other statement in the affidavit. Hill's Code, pars. 204, 1356; *McLeod v. Railway Co.*, 71 Iowa, 138, 32 N. W. Rep. 246; *Alger v. Thompson*, 1 Allen, 453; *State v. Lantz*, 23 Kan. 728. But counsel for the State insists that the record does not disclose that the comments of the district attorney, or the consideration of the affidavit by the jury, produced any improper influence upon the jury or prejudiced the defendants in any way. A copy of the affidavit is in the record, from which it is apparent that an inference may have been, and perhaps was, drawn, unfavorable to the defendants, because of their failure or neglect to secure the attendance and testimony of the witnesses named therein, and hence we cannot say the error was a harmless one. The cause must therefore be reversed, and a new trial ordered." *State v. Baker et al.*, 23 Oreg. 441, 32 Pac. Rep. 161.

Wrong to urge conviction because defendant can appeal.—In his closing, the district attorney told the jury that if they acquitted the defendant he could never be tried again, but if they convicted him, "and in doing so should by mistake convict an innocent man, then he has his right of appeal, and the court of appeals will reverse the case and give the defendant a new trial, and no injury will be done."

The court of appeals in a well considered opinion analyzed the question and said that such argument should not have been tolerated for a moment; that it was misleading as a matter of fact; that it was an appeal to override the scruples of a reasonable doubt; that the jury, although not convinced beyond a reasonable doubt, might nevertheless, in their desire to punish for a heinous crime, conclude that it was best to convict, and then the court of appeals might correct the evil if they thought the verdict wrong; and so the defendant would not be in danger, if innocent. That the assumption that an innocent man's conviction would be righted on appeal was fallacious; for the appellate court only examines the statement of evidence to ascertain if the guilt of the appellant appears with reasonable certainty; and if so, in the absence of errors of law, it will affirm the judgment; the question with the court being, not whether the defendant was proven guilty beyond all reasonable doubt, but whether the evidence justifies the action of the jury. The court does not pass upon the credibility of witnesses and weight of evidence; it is the province of the jury to do that. If there are conflicting theories of guilt and innocence, the court will not reverse, if there is sufficient evidence to support the verdict and make guilt reasonably certain, even though the court might not be free from doubt on the facts, but will accept the verdict as conclusive on conflicting theories. The opinion is expressed that there are hundreds of convictions of innocent persons that have been affirmed on appeal. *Crow v. State*, 33 Tex. Cr. Rep. 264.

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In *Brazell v. State*, 33 Tex. Cr. Rep. 333, the prosecutor told the jury that defendant could appeal but the State could not, "and who knows the house that will be next entered by this burglar, and the murder that might be committed." Also condemned.

Talking to the jury about "boodle prosecutions," exceptions, Supreme Court, appeals, etc.—The State's Attorney, in opening his case, was allowed to talk about the "boodle prosecutions in New York city;" to comment upon an application for change of venue; to explain the nature of exceptions that would be taken by the defendants' counsel; that all of the evidence would be taken by stenographers; that on appeal all of the record would go the Supreme Court, and if it should appear to the "*seven wise men down at Ottawa*" that the judge made some remark he should not have, they would consider whether or not a new trial should be granted; that errors may be run into the record; that the defendants had a right to testify, etc.; and when objection was made to his remarks he said, "There is another exception. The court thinks I am right, or he would tell me to vary my line of argument." Other extraneous matters were dragged in.

The court held that the jury had nothing to do with exceptions, changes of venue, or defendants' right to testify; and in referring to the statement as to defendants' right of appeal to the Supreme Court, the court quotes from *State v. King*, 64 Mo. 595, wherein it was said: "The statements that the higher court referred to, had the power to review the finding of the jury on the weight of evidence, was calculated to induce the jury to disregard their responsibility." And the court asks why the prosecutor was allowed to ridicule the laws of the State, and say, "but whatever may have been the object, the effect of what was done, without doubt, created a prejudice in the minds of the jury, and may have, in part at least, led to the verdict which was rendered."

In his closing argument the prosecutor said: "They say there is a fabled tree which grows in some torrid clime; that the birds of the air which fly near its branches, influenced by the aroma of it, fall beneath it and die. That is the influence of M. C. McDonald (not a defendant in the case on trial) in this and all matters connected with the administration of justice;" and similar allusions.

The court held that it was the duty of the trial court to have confined the prosecutor to "a consideration of such matters as properly pertained to the case, under the evidence." The case was reversed. *McDonald v. People*, 126 Ill. 150.

Referring to another indictment.—Defendant on trial for abandonment, and prosecutor was allowed to repeatedly advise the jury that he had been before indicted for seduction, and that the case on trial grew out of that. The court of appeals said: "Such matter had nothing to do with the offense here charged, was foreign to the issues here made, and its introduction only tended to prejudice the jury." *State v. Good*, 46 Mo. App. 515.

United States' district attorney tells jury that defendant is guilty of another offense, notwithstanding acquittal, etc.—Hall was tried in a federal court in Arkansas, for killing Yates. It seems to have been conceded that the defendant had gone back to Mississippi to stand trial for killing a negro, and was acquitted of that charge. In his

closing argument to the jury, the district attorney said: "We know what kind of trials they have in Mississippi of a white man for killing a negro. We know from reading the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness, but in the light of the nineteenth century. The defendant came from Mississippi with his hands stained with the blood of a negro, and went to the Indian country, and in less than four months had slain another man," and that "the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was *murder*," etc. The United States Supreme Court said that the conduct of the district attorney was a breach of professional and official duty and should have been promptly rebuked. That whether or not such a state of affairs prevailed in Mississippi was a matter of personal belief and opinion, rather than of historical fact, capable of being used for illustration. That if such a state of affairs were admitted to exist, it would not warrant the conclusion that every person or any particular person indicted there for such offenses was guilty. That the district attorney did not even confine himself to methods of illustration, but drew conclusions from such supposed facts that the defendant was guilty of murder in Mississippi. That if the defendant had been convicted there, that fact would have been incompetent to support the charge for which he was being tried. That "this whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had murdered one man in Mississippi, and should therefore be convicted of *murdering another man in Arkansas*." Judgment reversed on this ground alone. *Hall v. United States*, 150 U. S. 76.

Stating defendant to be of dangerous character.—One of the prosecuting attorneys said to the jury in his argument, "the defendant is a man of bad, dangerous and desperate character, but I am not afraid to denounce the butcher boy, although I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." The Supreme Court held that this statement was an unwarrantable assumption of facts as to the character of the prisoner, coming from counsel of high standing, not under oath, and incompetent if sworn to, and that its inevitable tendency was to prejudice the jury against the defendant. That it was the right of defendant to be tried for the specific offense charged, upon competent evidence confined to that issue, and that it was the duty of the trial judge, of his own motion, to prevent such breaches of the privilege of counsel. *Martin v. State*, 63 Miss. 505.

Vilifying the defendant.—"In his address to the jury, the county attorney used the following language: 'This defendant, I. L. Stone, is a contemptible and pusillanimous puppy. He comes into this court with the swaggering insolence of a grocery bully, and pleads not guilty to this charge. During the dead hours of the night, while his family were at their humble home shedding tears of regret over the sad downfall of the husband and father, this man, this biped, I. L. Stone, is bedding up with these prostitutes. Had I the command of language to stand here and express my contempt of this thing, this I. L. Stone, I could stand until the dawn of resurrection day, and then say less than

he merits. If I were going to establish a hell on earth, and invade the limbs of darkness for one to supervise it, I would leave there, and come back here and take I. L. Stone, for he is a fair representative of the devil."

"Such language was uncalled for and highly reprehensible. It was not argument, not a discussion of the evidence. It was a personal and undignified abuse of the accused, such as should never be tolerated in a court of justice. It was calculated to arouse the passions of the jury against the defendant, and to materially prejudice him in the trial. It was such error in the proceedings as would of itself cause a reversal of the judgment." From *Stone v. State*, 22 Tex. Ct. App. 185.

Insinuations.—Williams, a Chinese inspector at San Francisco, was convicted of extortion in the federal court. On the trial, the defendant's attorney sought to interrogate the collector of customs, who was a witness for the defense, on certain matters, and being asked why, he answered: "It has been sworn to by Mr. Tobin that Mr. Williams asked for certain cases to be assigned to him and show result. We propose to show by Mr. Wise that . . . he assigned to Williams the investigation of Chinese female cases, and that while Williams was acting in that behalf, there were more females sent back to China than ever were sent back before and after." The prosecuting attorney objected to this evidence as irrelevant, saying, "No doubt, every Chinese woman who did not pay Williams was sent back." Objection was made to the prosecutor's remarks but overruled. The Supreme Court held that the remarks were highly improper to be made in presence of the jury, and that the trial court erred in not sustaining the defendant's objection. *Williams v. United States*, 168 U. S. 382, 18 Sup. Ct. 92 (1897).

Prosecutor tells of a note he received, etc.—"The defendant was such a scoundrel that he was compelled to move his trial from Jones county to a county where he was not known." And, "The bold, brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me if I did, he would get the legislature to impeach me." These were remarks to a jury by the prosecuting attorney, and were condemned by the Supreme Court as being prejudicial to the defendant and not founded on any evidence before them. As to the change of venue, the jury could not inquire into the reasons and motives therefor; and such a course would defeat the object of the law itself; for, changing to avoid prejudice in one county, the prosecutor could thus resurrect the prejudice in the county to which the change was taken. If there was such a note to the prosecutor, it was in no way connected with the issue on trial, and "constituted a new and distinct offense."

The court indorsed the doctrine that it was the duty of the trial judge to stop counsel when grossly abusing his privilege "there and then," and that when he fails to do so it is ground for a new trial. The court concluded: "The defendant was arraigned at the bar of the court, mute and helpless, without raising an unseemly controversy with the solicitor. The court is his constituted shield against all vituperation and abuse, and more especially when it is predicated upon alleged facts

not in evidence, or admissible in evidence." *State v. Smith*, 75 N. C. 306.

Like the upas tree.—"That no man who had lived in the defendant's neighborhood could have anything but a bad character; that defendant polluted everything near him, or that he touched; that he was like the upas tree, shedding pestilence and corruption all around him." These words were used by plaintiff's attorney in a civil case and were objected to because defendant's character had not been impeached, etc. The Supreme Court said there was nothing in the record to justify such an "unprovoked and wanton assault," the object of which was to humiliate and degrade the defendant, and prejudice him before the jury, and reversed the case on this ground. *Coble v. Coble*, 79 N. C. 589.

Error for prosecutor in his argument to turn toward the defendant and inferentially call upon him for an explanation of where he was, on certain dates, connected with the charge against him.—From opinion: "In the opening argument, counsel for the State said: 'We have proved where the defendant was on the 29th, 30th, and 31st of January, 1893, and on the 1st, 2d, 3d and 4th of February, 1893, and we have shown by the witness Forrester that the defendant was present and committed this burglary;' and then, facing the defendant, said: 'Now, where does he say he was, if he was not there?' On objection being made, the court admonished the counsel not to refer to that, and told the jury not to consider it. It seems from this that the trial judge understood the counsel to be referring to the fact that the defendant had the opportunity to testify with regard to this matter, and had not availed himself of the privilege. We think the remark bears this construction, and under repeated decisions the allusion is cause for reversal; and the fact that the court rebuked them, and withdrew them from the consideration of the jury, does not cure the vice." *Brazell v. State*, 33 Tex. Cr. Rep. 333, 26 S. W. Rep. 723.

Unwarranted insinuations of bribery against witness.—One of the prosecuting attorneys, in the closing to the jury, said: "I tell you, gentlemen, money talks. Oliver Helm, Amanda Helm and Ed. Short were witnesses before the grand jury and at the coroner's inquest. They were then witnesses for the State. Now they are witnesses for the defendant. We have been prepared for this thing. We knew someone had been to Ottumwa and Bonaparte, and were prepared for the evidence from there."

The Supreme Court held that the remarks inferred that the witnesses had been bribed, and were wholly outside of the case, there being nothing in the record to justify any such assumption. These witnesses were not called by the State, but no explanation was made, and no conflict between their testimony on the trial and elsewhere was in any way shown; and the tendency of these unauthorized declarations was to impair their credibility. *State v. Helm*, 92 Iowa, 540.

Abusing defendant; defying court of appeals and defendant's counsel, and general rant.—The court of appeals had granted a new trial, and on retrial one of the prosecuting attorneys, in summing up, told the jury the defendant was guilty, and, on exceptions being taken, said,

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"Yes, take your bill, and as often as this case is taken to the court of appeals and reversed on some foolishness or technicality, I will, as often on a new trial, as I can get the case before twelve honest men, convict him (defendant) again and again," and repeated this language with additions. And on exceptions to his remarks being allowed, and being admonished by the court to confine himself to the evidence, he continued his remarks, and referring to other similar indictments he was going to try, said, "and when they, as has this defendant, been once fairly convicted by twelve honest men, and by a dodge and technicality had the case reversed, and now represented by able counsel watching for an error, I will teach them to throw themselves upon the mercy of the jury and the court," and more in this strain. The court held that reference to a former verdict against the defendant was against the letter and reason of the law; and read a lecture to prosecutors who by their intemperate zeal themselves cause their cases to be reversed. The remarks were characterized as vituperative and reprehensible. And the court held that the judgment must be reversed "because of the character and course of argument indulged in" by the prosecutor." *Hatch v. State*, 8 Tex. Ct. App. 416.

Wrong to state that claiming a legal privilege is evidence of guilt.—The case of *Gossett v. State*, 65 Ark. 389, 46 S. W. Rep. 537 (1898), is pertinent not only on improper argument of the prosecutor, but also on the question of inferring guilt from refusal of defendant to explain evidence apparently against him. Convicted of stealing two barrels of whiskey, etc., from a car. He denied knowledge of the theft, but admitted that about the time thereof he had two gallons of whiskey. He refused to answer where he got it, because he was under indictment in the federal court for illicit distilling, and his answer might tend to incriminate him on that charge. The trial judge held that he need not answer. The prosecutor argued to the jury that defendant's refusal to explain his possession of the whiskey was evidence of guilt. The Supreme Court said that his refusal to answer because his answer might tend to convict him of another offense was no evidence of guilt in this case; and that the jury had no right to draw a conclusion of guilt from his refusal to answer a privileged question, although such course might affect his credibility; and that the argument of the prosecutor was improper and the ruling of the court below permitting him to so argue was erroneous, and reversed the case.

"Good time" argument, to increase penalty.—"Counsel for the People, in his argument to the jury, called attention to what is generally known as the "good time" statute, and insisted that it should be taken into consideration in fixing the defendants' terms of imprisonment, if they were found guilty. To this defendants' counsel interposed an objection, but it was overruled and an exception taken. This was error. That statute has no application whatever to criminal trials. It relates purely to prison government and discipline. Whether a convict shall receive a reduction of time for good conduct during his imprisonment is a question between him and the prison officials. To permit a jury to be in any way influenced by it, in fixing a prisoner's punishment, would tend to defeat its object." *From Farrell v. The People*, 133 Ill. 244.

Frequency of "burnings," urged.—Defendant on trial for arson, and prosecutor in his closing argument alluded to the frequency of burnings throughout the country, and urged upon the jury the importance of strictly enforcing the law in this case. The court held that this was extraneous matter. That the fact was not one of such public notoriety or matter of history as that the court or jury could take judicial cognizance of it. That counsel can only state facts of which there is no evidence when they are of such character as to be noticed judicially without proof; and that the remarks were intended to prejudice the defendant. *Washington v. State*, 87 Ga. 12.

Murders, mobs, vigilance committees, etc.—It was held to be error for the prosecutor to refer to the frequency of such things in the community and to state that they are caused by a lax administration of the law, and urge the jury to make an example of the defendant. *Ferguson v. State*, 49 Ind. 33.

Lugging in alleged action of another judge against defendant and artistic epithets.—Convicted of bigamy. In his closing argument to the jury, the prosecutor repeated remarks attributed to Judge Gibson on a hearing for alimony in another court, and said that Judge Gibson had ordered defendant into custody and was at the bottom of this prosecution, etc., there being no evidence touching such matters. Prosecutor also called defendant "a sugar-loaded, squirrel-headed Dutchman;" all of which was censured by the Supreme Court as reversible error. *State v. Ulrich*, 110 Mo. 350, 19 S. W. Rep. 656.

Had time to prove good character.—The prosecuting attorney so informed the jury, and reasoned therefrom, that, because the defendant had not seen fit to avail himself of the benefits of his glorious privilege, he was unable to produce one.

From the unceremonious manner in which the Supreme Court reversed the judgment, one would infer that it did not share the prosecutor's opinion, that *time was of the essence* of a defendant's good character. *Thompson v. State*, 92 Ga. 448.

In examination of defendant.—Improper for prosecutor, when examining defendant and asking him about an old alleged assault upon a party not connected with the case, to say to him in hearing of the jury, "You never beat him up but once, and that was enough to nearly kill him." *Morrison v. State*, 44 S. W. Rep. 511.

A personal acquaintance of the prosecutor.—It is a palpable abuse of privilege for the prosecutor to argue to the jury (the defendant being tried for selling liquor to an intoxicated person) that he knew personally the defendant, and that he was guilty of this, and he was sure of other crimes. *Brow v. State*, 103 Ind. 133.

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CARTER v. STATE.

106 Ga. 372—32 S. E. Rep. 345.

Decided February 2, 1899.

ARSON: *Indictment*—"House"—*Instructions*—*Evidence*—*Accomplice*—*Jury*—*Qualifications*.

1. It is not essential that an indictment for arson, charging the burning of an "outhouse," should allege whether or not the same was located in a city, town, or village.
2. A freight-car body, which has been detached from the wheels, and placed upon permanent posts near a railway track at a station, and to which a platform has been attached, thus constituting a structure to be used as "a freight warehouse," and which is used for this purpose only, is a "house" within the meaning of section 136 of the Penal Code.
3. Such a house, located elsewhere than in a city, town, or village, may be characterized as an "outhouse," though not appurtenant to any other building.
4. When the principle embraced in a request to charge is so fully covered by the general instructions given to the jury that they could not possibly be mistaken as to the true law of the point in question, refusing to give such a request is not cause for a new trial.
5. According to the rule laid down by this court in *Byrd v. State*, 63 Ga. 661, the acts and declarations of one accomplice, done and made during the pendency of a common purpose and effort to conceal a crime already perpetrated, are admissible against another accomplice.
6. A new trial will not be granted because of a refusal by the court to inquire whether or not any of the panel of jurors were disqualified by relationship, when it is not shown that in point of fact a juror thus disqualified was placed upon the panel.
7. The discretion of the trial judge in determining, upon conflicting evidence, whether or not a juror was impartial, will not, unless abused, be interfered with by this court.

(Syllabus by the Court.)

Appeal from Wayne County Superior Court; J. L. Sweat, Judge.

H. B. Carter was convicted of arson. Judgment affirmed.

John W. Bennett, Solicitor General, *Goodyear & Kay*, and *D. M. Clark*, for the State.

Thos. E. Watson, *Brantley & Bennett*, and *E. D. Graham*, for plaintiff in error.

LUMPKIN, P. J. Upon an indictment against H. B. Carter, D. H. Moody, F. Herrington, and Jim Moody, charging them with the crime of arson, Carter was separately tried and convicted. His bill of exceptions alleges error in overruling a demurrer to the indictment, and in refusing to sustain a motion for a new trial. We will undertake a brief discussion of the material questions thus presented.

1. The indictment charged the wilful and malicious burning of "a certain freight warehouse," the property of the Southern Railway Company, "the same being then and there an outhouse." The point made by the demurrer was that the indictment failed to allege whether or not the house alleged to have been burned was in a city, town, or village. The decision of this court in *Smith v. State*, 64 Ga. 605, practically settles this question. It was there held that: "Whether the outhouse burnt be in a city, town, or village, or not, does not affect the legal character of the offense. It affects the punishment only." Accordingly, a ruling of the trial court refusing to exclude testimony on the ground that the indictment failed to allege that the outhouse was not in a city, town, or village was sustained.

2. The next question for determination is whether or not the structure burned was a "house," within the meaning of section 136 of the Penal Code, defining the offense of arson. The evidence shows that the body of a freight car had been taken off the wheels, and placed near the railway track at a station, that it was supported upon permanent posts, and that a platform, to be used in transferring freights to and from the car body, had been attached to the same. It further appeared that the structure thus located was used as "a freight warehouse" by the railway company, in precisely the same manner as if it had been an ordinary warehouse built for this identical purpose. In view of these facts, we have no difficulty in holding that the structure in question was a "house," and accordingly we approve the instruction to this effect given by the trial judge to the jury. That the structure with which we are now dealing was not in shape like an ordinary house, or that a portion of the same had been formerly used as a movable car, does not prevent it from being, within legal contemplation, a house. It was certainly no longer a car; and having all the elements of permanency, and being

adapted to the uses for which a warehouse is suitable, we see no reason why it should not be treated as a structure coming within the protection of the statute above cited. See, in this connection, *Williams v. State* (this term), 32 S. E. Rep. 129.

3. As will have been observed, the indictment alleged that this structure was an "outhouse." There was no evidence showing that the Southern Railway Company had or owned any other building at this station; and counsel for the accused thereupon insisted that the house in question could not, in legal contemplation, be an "outhouse," and, accordingly, that there was a fatal variance between the allegations of the indictment and the proof. It is true that the word "outhouse" primarily means a building adjacent to a dwelling-house, and subservient thereto, but distinct from the mansion itself. See 2 Bouv. Law Dict. 341; Black, Law Dict. 859; And. Law Dict. 515. After careful consideration, however, we have reached the conclusion that the word "outhouse," as used in sections 136, 141, and 142 of our Penal Code, as applied to a structure not located within a city, town, or village, is intended to embrace a house of any description which is not a dwelling-house. In *Watt v. State*, 61 Ga. 66, this court held that the wilful and malicious burning of a country church was indictable under section 4379 of the then existing Code, which is the same as section 141 of the present Penal Code. The status of a railway warehouse, located elsewhere than in a city, town, or village, cannot be legally different from that of a country church similarly situated. That all houses other than dwelling-houses, thus located, were intended to be regarded as "outhouses," seems manifest from the provisions of section 142 of the Penal Code, which declares that "setting fire to an outhouse of another, as described in the preceding section, shall be punished," etc.; for, unless this meaning be given to the word "outhouse" as used in section 142, we would have no penalty whatever for the offense of setting fire to a house of the kind described in the present indictment. The truth is, the prefix "out" was totally unnecessary in this connection, except for the exclusive purpose of distinguishing dwelling-houses from other houses; but the use thereof should not, we think, be given the effect of defeating the legislative will, which clearly was to include buildings other than those which would ordinarily be

understood as falling within the class designated by the word "outhouse."

4. All of the persons named in the indictment were accused as principals. The court was requested to charge that if Carter, who was then on trial, was guilty either as an accessory before the fact or as an accessory after the fact, he could not lawfully be convicted under this indictment. The court refused to instruct the jury in the precise language of the requests presented, but did charge the jury repeatedly, distinctly, and unequivocally, that the accused could not be convicted unless they were satisfied beyond a reasonable doubt that he was present at the time the arson was committed, and actually participated in its perpetration. A mind of even ordinary comprehension could not have failed to understand, from the plain and explicit language used by the judge, that no verdict of guilty could properly be returned against the accused unless the evidence showed his guilt as a principal. The jury must have known, from the instructions given them, that no matter how intimate a connection with crime Carter may have had, either before or after its commission, he could not be lawfully convicted of the charge brought against him unless he was present and actually participated in the burning of the house. This being so, and the evidence tending to show his guilt as a principal being very strong, we do not feel constrained to order a new trial because of the court's refusal to give the requests above mentioned, although we do not hesitate to say it would have been the better practice so to do.

5. The court admitted, over objection of the accused, evidence of certain acts on the part of D. H. Moody, and declarations immediately accompanying the same, and also a letter written by him to Herrington, all tending to show a guilty connection on Moody's part with the crime charged in the indictment, and also to some extent implicating Carter as a participant therein. These acts were done and these declarations were made some time after the arson had been committed, and the letter was written at a still later period; but there was, independently of the conduct and sayings of Moody with which we are now dealing, and of anything contained in his letter to Herrington, much evidence tending to show there was a conspiracy to steal goods from the warehouse and burn the building, and also to establish

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the State's contention that Carter was actively concerned, not only in the theft and arson, but also in a common intent and purpose on the part of the conspirators to effectuate a concealment of these crimes, and shield each other from detection and punishment. In other words, there was, outside of the evidence objected to, proof authorizing the conclusion that the alleged conspiracy embraced a "criminal enterprise," the scope of which included larceny, arson, and concealment. There was also some evidence warranting the inference that this enterprise was still pending on the occasions to which the evidence complained of as illegal related. It seems, therefore, under the decision of this court in *Byrd v. State*, 68 Ga. 661, that this evidence was admissible against Carter. In that case it was distinctly ruled that the acts and conduct of one accomplice during the pendency of the wrongful act, not alone in its actual perpetration, but also in its subsequent concealment, were admissible against another accomplice. This holding was doubtless based upon the idea that the criminal enterprise was still pending while the conspirators continued to be active in taking measures to prevent the discovery of the crime, or the identity of those connected with its perpetration.

6. One ground of the motion for a new trial complains that the judge erred in refusing to inquire whether or not any of the panel of jurors put upon the accused were stockholders in the Southern Railway Company, or were related to such stockholders. As it was not made to appear that any juror having such a disqualification was in fact upon the panel, this ground is obviously without merit.

7. The only remaining ground of the motion for a new trial which need be noticed is one alleging partiality on the part of a juror. This ground was supported by evidence going to show that prior to the trial the juror in question had used expressions indicating prejudice against the accused. By way of counter showing, however, the juror made an affidavit positively denying the use of the language imputed to him, and was in this respect corroborated by other evidence. It therefore simply appears that, upon a conflict of testimony which would have warranted a finding either way, the judge held that the juror was not incompetent to try the accused, and certainly there was no

abuse of discretion in so doing. Judgment affirmed. All the justices concurring.

NOTE (by H. C. G.).—It may well be doubted whether the conclusions reached by this very able court in the fifth paragraph of its opinion would be sustained by the weight of authority of other appellate courts.

The sixth paragraph, however, is suggestive of hasty consideration, and oversight of important considerations. It was very material to ascertain whether any of the jurors were stockholders in the Southern Railway Company whose property it was alleged was burned, or whether they were interested in the company, or were related to persons who were. The trial judge erred grossly in denying such examination of the jurors, and the Supreme Court erred in affirming his ruling, on the ground that it was not affirmatively shown that any juror so disqualified, *in fact*, was on the panel. How were such facts to be ascertained, if not by examining the jurors themselves? Who could disclose such facts so well as they? There might be no other way of ascertaining whether they had stocks or bonds locked up in their trunks, or deposited in New York; or whether their wives, parents or children had; or whether they had relatives holding positions in the company. Further, the only time they could be legally questioned or compelled to answer such questions was while being examined as to their qualifications as jurors; and when inquiry into such facts was then denied, how could it afterward be opened up to ascertain whether in fact jurors with such disqualifications had been accepted? The court puts itself in the illogical and arbitrary position of a master, who would forcibly prevent his servant from pursuing a runaway cow, and then afterwards condemn and punish him for not catching the cow.

STATE V. WHITMORE.

147 Mo. 78—47 S. W. Rep. 1038.

Decided November 21, 1898.

ARSON IN FIRST DEGREE: *Indictment—Jail—Dwelling-house.*

1. Under Revised Statutes 1889, section 3511, providing that the burning of "any dwelling in which there shall be at the time some human being" is arson in the first degree, and section 3512, providing that "every house, prison, jail," etc., shall be deemed a dwelling-house, an indictment for arson in the first degree, charging defendant with burning a jail, which fails to allege that it is a dwelling-house, is fatally defective.
2. Under Revised Statutes 1889, section 3512, providing that a jail which is occupied shall be deemed a dwelling-house of any person having charge thereof, or so lodged therein, within the meaning

of the statute defining arson, an indictment for burning a jail must allege its ownership.

3. When it was in charge of the sheriff, who resided in the upper story of it, such ownership should be laid in him.
4. Where defendant was convicted of arson in the first degree, and the indictment proves defective, the State cannot treat matters of description, which are necessary only under the statute defining arson in the first degree, as immaterial and surplusage, and thus bring it within the provisions of the statute defining arson in the third degree.

Appeal from Grundy Circuit Court; Hon. P. C. Stepp, Judge. Reversed and defendant discharged.

Edward C. Crow, Attorney-General, and *Sam B. Jeffries*, Assistant Attorney-General, for the State.

Harber & Knight, for the appellant.

SHERWOOD, J. Arson the charge, ten years' imprisonment in the penitentiary the punishment, and the indictment as follows: "The grand jurors for the State of Missouri, and from the body of Grundy county, duly impaneled, charged and sworn upon their oaths, present and charge that on the — day of —, 1897, at Grundy county, Missouri, one Eugene Whitmore, being then and there a prisoner confined in the county jail of Grundy county, Missouri, then and there situate, the said county jail being then and there the prison of the said Grundy county, Missouri, wherein the prisoners convicted of misdemeanors were then and there usually confined and lodged; and wherein also certain human beings, officers, servants and employees of said county in charge of and employed in said county jail, then and there did usually lodge, he, the said Eugene Whitmore, did then and there feloniously, wilfully and maliciously set fire to the county jail, aforesaid, and the said county jail then and there wilfully, feloniously and maliciously did burn, in which said county jail were then and there divers human beings, who usually lodged therein, against the peace and dignity of the State."

The sufficiency of this indictment having been challenged, it is in order to determine that point.

Sections 3511 and 3512, Revised Statutes 1889, relating to the crime of arson are these:

Section 3511. "*Arson in first degree.* Every person who shall wilfully set fire to or burn any dwelling-house in which there shall be at the time some human being, or who shall wilfully set fire to or burn any boat or vessel in which there shall be at the time some human being, or who shall wilfully set fire to or burn any bridge or causeway upon any railroad, shall upon conviction be adjudged guilty of arson in the first degree."

Section 3512. "*Dwelling-house defined.* Every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein, shall be deemed a dwelling-house of any person having charge thereof or so lodged therein; but no warehouse, barn, shed or other outhouse shall be deemed a dwelling-house, or part of a dwelling-house, within the meaning of this or the last section, unless the same be joined to or immediately connected with and is part of a dwelling-house."

Section 3515 of the same article is the following: "Every person who shall wilfully set fire to or burn any house, building, barn, stable, boat or vessel of another, or any office or depot or railroad car of any railroad company, or any house of public worship, college, academy or school-house, or building used as such, or any public building belonging to the United States or this State, or to any county, city, town or village, not the subject of arson in the first or second degree, shall, on conviction, be adjudged guilty of arson in the third degree."

The first question presented for consideration is the sufficiency of the indictment; defendant insisting that it fails to charge any offense under the law. I have quoted the several sections aforesaid in order to show under which section the indictment was intended to be drawn. Evidently the indictment was drawn under section 3512, and is for arson in the first degree. The lower court so treated it, because it instructed the jury that if they found the defendant guilty as charged, they should assess his punishment at not less than ten years' imprisonment in the penitentiary, an instruction only proper where a trial occurs for arson in the first degree.

There are, as it seems to me, several defects in this indictment which I will now proceed to make comment upon: To begin with, the indictment is bad because it does not allege that the building burned was a "*dwelling-house*," because where this

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is the statutory term employed, there, the indictment must use it or else the indictment will be ill. *McLane v. State*, 4 Ga. 335; *State v. Sutcliffe*, 4 Strobb. Law, 372; 1 Whart. Crim. Law (10th ed.), sec. 840. These words are words descriptive of the crime of arson in the first degree, and therefore must be employed.

Within the meaning of section 3512, a jail, when "usually occupied by persons lodging therein, shall be deemed a dwelling-house of any person having charge thereof or so lodging therein;" but in order to make the burning of such building arson in the first degree, there must be in the building, at the time of the burning, some human being. At common law the ownership of the house must be alleged and proved as laid. Whart. Crim. Law (10th ed.), sec. 841.

Our statute has not done away with this requisite of the common law. In fact, section 3512 has made such provision as renders it easy to allege and prove the *quasi*-ownership. Such ownership should therefore have been alleged; and as the jail was in charge of the sheriff, and as he with his family lived in the upper story of it, the ownership should have been laid in him, giving his name.

In New York, where the statute in regard to arson in the first degree is, with the exception of the words "in the night time," substantially identical with our own, it has been ruled that the house or the building burned must be described as the house or building of the *person in possession*. *People v. Gates*, 15 Wend. 159.

We have been referred to *State v. Johnson*, 93 Mo. 73, as upholding the view that the ownership has been sufficiently alleged in this case; and it is true that case does so hold, but that ruling was made by quoting only a *portion* of section 3512, to wit: "Every house, prison, jail, or other edifice which shall have been usually occupied by persons lodging therein," thus *cutting the section in two and leaving off* the important and controlling words, "*shall be deemed a dwelling-house of any person having charge thereof, or so lodging therein.*" With these words thus *omitted*, that ruling was correct, but their omission was an *emasculat*ion of the statute, and wholly unwarranted. That case, therefore, should no longer be held as binding authority.

An additional reason occurs why *Johnson's Case* should not be followed as a precedent: the indictment, though for the same degree of arson as the present one, does not allege that there was a human being in the penitentiary at the time of the burning. This was doubtless the fact, but that did not help the indictment.

There are doubtless cases where the charge consists in burning a public building, where no ownership is necessary to be specially alleged, any more than to say that it was "the county jail of — county." *Com. v. Williams*, 2 Cush. 582; *State v. Roe*, 12 Vt. 93.

If the present indictment had been drawn under section 3515, such a general averment would indubitably have been sufficient. But the indictment was drawn under section 3512 aforesaid, and therefore it is unnecessary to consider, except by way of illustration, what would have been the proper form of an indictment drawn under section 3515.

Again, defendant having been tried and convicted under section 3512 of arson in the first degree, the State will not be allowed to treat matters of description which are only necessary to be alleged under that section, as immaterial and surplusage, and thus bring this case under the provisions of section 3515. In civil cases, a party will not be allowed to take inconsistent positions in court. *McClanahan v. West*, 100 Mo. 309, and cases cited. And in criminal cases in like circumstances, the State should also be estopped from trying a cause on one theory in the lower court, and then insisting, in this court, upon affirmation of the judgment on another and different theory.

Inasmuch as the indictment in this case is, for the reasons stated, wholly insufficient, the judgment should be reversed and defendant discharged, and it is so ordered. All concur.

NOTE (by H. C. G.).—*Confessions and instructions*.—Where defendant in an alleged confession stated that another defendant, Spivey, to be tried separately, had asked him to get into his buggy and take a ride, and told him that he was going to burn Mr. Cosby's house; that it was all right, that he was to be paid for it by one Holmes, who acted for the owner, Cosby, and that defendant took care of the horse while the other set the fire, an instruction that if the jury believed beyond a reasonable doubt that defendant had been informed by Spivey of his object in going to the premises, and if he held Spivey's horse while he

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or another set fire to the house, etc., that defendant would be guilty of the offense charged, was not erroneous, as it did not tell the jury how to find the facts, but simply what conclusion to draw if they found the facts to be such. *People v. Jones*, 123 Cal. 65, 55 Pac. Rep. 698 (1898).

Corpus delicti and confessions.—It is not necessary that the evidence of the criminal act should be conclusive in order to admit a confession in evidence; nor is it necessary that the evidence of the *corpus delicti* should itself connect the defendant with its perpetration, to admit it. "A building may be burned under such suspicious circumstances as to indicate the act of an incendiary, and thus a *corpus delicti* established, and the doors opened for the defendant's admissions and confessions; but there must be some evidence of some kind, tending to show the incendiary character of the fire, aside from these admissions and confessions." *Id.*

Copy of insurance policy as evidence.—"A copy of an insurance policy covering the burned property was received in evidence, over appellant's objection, after his failure, on due notice, to produce the original. No reason appears for not introducing the copy made from the original, and in the absence of some showing for such omission, it was error to receive a copy made of a copy therefrom. See *Drumm v. Cessnum* (Kan. Sup.), 49 Pac. Rep. 78; *Winn v. Patterson*, 9 Pet. 663." From *State v. Cohen*, 108 Iowa, 208, 78 N. W. Rep. 857.

Copies of policies admissible.—"Other assignments of error have reference to the means employed to prove that the stock of merchandise and store building mentioned in the information were insured at the time of the fire. We think the evidence introduced was the best obtainable, and that is all the law requires. The policies were in possession of the defendant, and he refused to produce them after being notified to do so. It was then competent to show their contents; that they were made out and delivered by an authorized agent of the companies; and that the defendant was claiming indemnity under them." From *Wright v. State*, 58 Neb. 225, 78 N. W. Rep. 508 (1899).

Ownership of the property burned.—Indicted for conspiring to burn the property of Winne, trustee. Appellant, one of the defendants, was the owner of the premises where he had his dwelling-house, but Winne had a trust deed therefor. Held, that the interest of the appellant was a contingent one, depending upon his payment of the notes secured by the trust deed; that it was simply an equity of redemption, and that the ownership was properly laid in Winne. *Lipschitz v. People* (Colo.), 53 Pac. Rep. 111 (1898).

Defective indictment—Necessary ingredients.—The court said that at common law arson was a crime against the habitation rather than against property rights, and that the object of the statute was to extend the scope of arson, so as to more fully protect property rights. The indictment was for a conspiracy to burn, under a statute providing that "every person who shall wilfully and maliciously burn, etc., any dwelling-house, . . . office, etc., the property of any other person, etc., shall be deemed guilty of arson, etc." The court also said that the mere burning the house or another was not arson at common law, nor

under the statute; that arson consists in the *wilful* and *malicious* burning of a house. That every ingredient under the statute should have been pleaded. The allegations were, "feloniously, wilfully and maliciously did conspire, etc., to burn, etc., a certain residence building of the property of Winne, trustee, etc., etc." It was held that the words wilfully and maliciously used, clearly referred to the conspiracy charged, and not to the object of the conspiracy, and that the indictment was fatally defective in not charging that the conspiracy was to wilfully and maliciously burn the building. *Id.*

Insufficient evidence.—Indicted for burning a barn a mile and a half away from his home. His wife had left him and lived with the owner of the barn and her son. Defendant said that they had made him trouble, and that if they did not send his wife away, he would hurt them; that he could do a private injury and that the law could not hurt him; that on Friday before the fire, which was on Saturday night, he inquired whether a creek could be crossed at a certain place, being on a short cut between their places, and that defendant went in that direction; that a witness saw *some one* at four o'clock the night of the fire passing in the direction where defendant and others resided; that when defendant was arrested on Sunday, he said he had been up to midnight the night before killing a beef. The court said that "eliminating the threats, there was nothing left," and that the jury should have been instructed to acquit. *State v. Rhodes*, 111 N. C. 647, 15 S. E. Rep. 1038.

ATKINSON V. STATE.

58 Neb. 356—78 N. W. Rep. 621.

Decided March 22, 1899.

ASSAULT WITH INTENT: *Instructions—Reasonable doubt—Defending one's property on Halloween night.*

1. In a felony case, it is reversible error for a court to charge the jury that it may find the defendant guilty if it entertains a reasonable doubt of the truth of each or all of the material allegations of the indictment.
2. The law is that, if the jury entertains a reasonable doubt as to the truth of any material allegation of the indictment, the prisoner is entitled to an acquittal.
3. When a citizen assaults one of a mob in the wrongful possession of, and taking away, his property, for the purposes of injuring or destroying it, whether, under all the circumstances, he was justified in making the assault, is a question for the jury.
4. An assemblage of men, on Halloween night, October 31st, engaged in moving, injuring, and destroying property, is a mob engaged

in violating the law; and the citizen may use such force as is actually necessary to protect his person and property from injury at its hands.

(Syllabus by the Court.)

(The above is the syllabus as officially reported; but there is an evident error in the first paragraph, the instruction referred to being: "You are instructed that if you are convinced by the evidence, beyond a reasonable doubt, of the truth of each and all of said material allegations, then you may find the defendant guilty. If not so convinced, or if you entertain a reasonable doubt of the truth of each or all of said material allegations, then you should find the defendant not guilty."—J. F. G.)

Error to the District Court of Dawson County; Westover, Judge.

Harley Atkinson, being convicted of assault with intent to commit great bodily harm, brings error. Reversed.

G. W. Fox and *E. C. Cook*, for the plaintiff in error.

C. J. Smyth, Attorney-General, and *W. D. Oldham*, Deputy Attorney-General, for the State.

RAGAN, C. Harley Atkinson, in the district court of Dawson county, was indicted for having on the 1st day of November, 1898, in said county, assaulted one William King, with intent then and there to inflict upon him great bodily harm. Atkinson was convicted, and to reverse the judgment pronounced thereon he has filed here a petition in error.

The evidence, and especially that on behalf of the prisoner, tends to show that Atkinson lived with his family, in Cozad, Neb., and on the 31st day of October, 1898, was operating a threshing machine some six miles from his home. On the evening of that day he borrowed a buggy from the man for whom he was threshing, in which he drove to his home, which he reached about nine o'clock at night. There was no place in his barn where a buggy could be stored, and he left it standing against the outside of his barn. During the night a crowd of men were parading the streets of Cozad, disturbing and injuring property, and ignoring the efforts of the officers of the law and others to restrain them. Wagons, buggies and water-closets were being moved and hauled away, and in some instances

broken and injured, by this crowd. The crowd wished to get possession of the buggy in which the prisoner had ridden to town. Some of the crowd tried to get the buggy about ten o'clock that evening. The prisoner fired a gun over them at this time to frighten them away, and this enraged the crowd, and it threatened to get possession of the prisoner's buggy at all hazards, and to destroy it. The prisoner heard these threats. Some persons in the crowd threatened to shoot the prisoner and to whip him, and some of the crowd tried to get hold of the prisoner for the purpose of hurting him. The prisoner knew of these threats and attempts. This crowd was repeatedly warned by the prisoner and others that the prisoner would shoot, if an attempt was made to take his buggy. The crowd replied that they would have it, if they did get shot, and that when they did get it they would destroy it. This disorderly mob paraded around until between three and four o'clock in the morning. At that time a man named King, one of the crowd, followed by the others thereof, took hold of the buggy and started to run away with it. The prisoner called to him to drop it. This King refused to do. The prisoner then fired a gun over him, with a view of frightening him. King still retained possession of the buggy, and was moving off with it, when the defendant intentionally shot him in the leg with a shotgun, inflicting a flesh wound. The prisoner believed at the time he shot King that the crowd intended to immediately destroy the buggy if King got away with it, and he shot him for the purpose of stopping him, and preventing the crowd from taking the buggy away and destroying it. The prisoner at this time was afraid to leave his house to procure an officer of the law to protect his property, because he was afraid of violence at the hands of this mob.

On the trial the district court, after instructing the jury as to the material allegations of the information, charged them as follows: "You are instructed that if you are convinced by the evidence, beyond a reasonable doubt, of the truth of each and all of said material allegations, then you may find the defendant guilty. If not so convinced, or if you entertain a reasonable doubt of the truth of each or all of said material allegations, then you should find the defendant not guilty." The giving of this instruction was prejudicially erroneous. By it the

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court, in effect, told the jury that, to entitle the defendant to an acquittal, they must entertain a reasonable doubt as to the truth of each or all of the material allegations of the information. This is not the law. On the contrary, the law is that, if the jury entertain a reasonable doubt as to the truth of any material allegation of the information, the prisoner is entitled to an acquittal.

2. Another instruction given by the court was as follows: "The court instructs the jury that an assault is an unlawful attempt, coupled with the present ability, to commit a violent injury upon another; and in this case, unless the jury believe from the evidence, beyond a reasonable doubt, that the defendant shot William King with a loaded shotgun, intending to shoot him, and with the then present ability to shoot him, then the jury should find the defendant not guilty." This instruction, in view of the evidence, was wrong. The prisoner did not contend that he did not shoot William King with a loaded shotgun, nor that he did not intend to shoot him, nor that he did not then and there have the present ability to shoot him; but the defense was that he shot him in defense of his property, and resorted to this means because he was afraid to leave his house to procure the assistance of the officers of the law for the protection of his property, as he feared that, if he did so, he would receive great bodily injury at the hands of this mob. By the instruction last quoted the court, in effect, took this defense of the prisoner from the jury, and told them to convict the prisoner, if they found that he, with ability to shoot, intentionally shot King with a loaded shotgun. We do not decide whether the prisoner was, under the circumstances detailed in the evidence, justified in shooting King. Whether he was or not was a question of fact for the jury, and this defense the prisoner was entitled to have the jury pass upon. By the instruction under consideration, the court took that theory entirely from the jury, and, in effect, instructed them to find him guilty. We are not justifying the possessor of property for shooting one who is committing a trespass thereon. But here was a man in his own home, in the peaceable and quiet possession of his property. A howling mob of brawlers, masquerading under the name of "Halloweeners," is parading the streets of his town, injuring and destroying

property; threatening to take the property of this prisoner and destroy it; threatening him with bodily injury if he interferes; and this mob takes possession of his property and attempts to take it away. It was for the jury to say whether the prisoner, as a reasonable human being, was justified, under the circumstances, in making the assault he did for the purpose of protecting his property; for he certainly had the right to protect his own. The fact that this crowd was observing the barbarous practice of committing mischief and depredation on the evening of the 31st of October did not deprive the prisoner of the right to defend himself and his property against their unlawful attacks, for, no matter under what name they may have masqueraded, the crowd was a mob, violating the law; and the county attorney of Dawson county would do no more than his duty if he caused each member of this crowd of midnight marauders to be indicted and punished. For the errors pointed out in the instructions, the judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

STATE v. GOERING.

106 Iowa, 636—77 N. W. Rep. 327.

Decided December 14, 1898.

ASSAULT WITH INTENT: *Self-defense—Instructions.*

1. One unlawfully assaulted may, in defense, repel force by force, the degree of which depends on the character of the assault. It is error to instruct the jury that such right to repel by force can only be used when there is apparent danger of such person being killed or suffering great bodily injury.
2. If the court undertakes to instruct the jury as to the law, "It is its duty to do so correctly; and a failure in this respect can be taken advantage of by defendant," without asking for a counter instruction.

Appeal from District Court, Marion County; Hon. J. D. Gamble, Judge.

Defendant, being convicted of an assault with intent to inflict great bodily injury, appeals. Reversed.

WATERMAN, J. The assault is charged to have been made upon one Lewis Leits. The evidence is not before us. The record we have sets out the indictment and the instructions given the jury, and this statement of facts: "There was evidence on the part of the State tending to prove that the defendant struck and beat one Lewis Leits with a club and whip, the said Lewis Leits being at the time unarmed. On the part of defendant, there was evidence tending to show that the said Lewis Leits assaulted the defendant with a knife in his hand, and that, when said assault was made, the defendant struck him several blows, but with his fists only, and that he did not at any time strike him with anything but his fists." The sole complaint is of the tenth paragraph of the court's charge to the jury, which is as follows: "The defendant pleads not guilty, which plea puts in issue every material fact necessary to support the indictment, and which must be established by the evidence beyond a reasonable doubt. And, for further and additional defense, the defendant claims that, at the time of the altercation with the said Lewis Leits, he was acting in self-defense. It is incumbent upon the State to prove beyond a reasonable doubt that the defendant at the time did not act in self-defense. *It is a law that a person may resist force with force in the defense of his person against one who manifestly intends or endeavors by violence to kill him or inflict upon him great bodily injury, and if a conflict ensues in such a case, and injury follows, such resistance is justifiable.* To justify the defendant, however, in thus resisting and inflicting such injuries in self-defense, he is authorized to use such force, and such force only, as may be necessary, or appear to him, as a reasonably careful, prudent, and cautious man, to be necessary, to protect himself from injury. While the danger must be imminent and perilous, yet it is not necessary that the danger should be actual, but it must appear to him, as a reasonably careful, prudent, and cautious man, to be actual, and such as that a reasonably careful, prudent, and cautious man *would have good reason to believe that his life was in danger, or that he was about to suffer bodily injury.* And, if such be the fact, he would then be authorized, under the law, to make resistance thereto, even though such resistance might result in the death of his assailant, or in his suf-

fering great bodily injury. Where an assault is made, and there is a reasonable opportunity for the assailed party to withdraw and avoid the conflict and the threatened or feared injury, it is his duty to withdraw and avoid the conflict or injury. If he has such reasonable opportunity to withdraw, and fails to do so, then he would not be justified in self-defense in inflicting painful or hurtful wounds upon his assailant. An assailed party is not required to run away or withdraw when an assault is made with such a violence that he cannot safely withdraw, or if it appear to him, as a reasonably careful, prudent, and cautious man, that he could not safely withdraw and avoid the conflict and the injury threatened; but under such circumstances he would be authorized to stand and resist the assault with such force, and only such force, and with such weapons or means, as were necessary therefor, or such as would appear to him as a reasonably careful, prudent, and cautious man, under like circumstances necessary therefor. And in this case, if you find from the evidence that Lewis Leits assaulted the defendant *in such a manner and under such circumstances as that the defendant did believe, or as a reasonably careful, prudent, and cautious man had reason to believe, that he was about to be killed, or to suffer some great bodily injury, and that he could not withdraw and avoid the assault and encounter, then he would be justified in using such force, and such force only, as would enable him to resist the assault, and protect his life, or protect himself from such great bodily injury, and would be authorized, if it were necessary, as hereinbefore defined, to inflict upon the said Lewis Leits such injury as was reasonably necessary for his protection. But if he could have withdrawn from the conflict, and avoided the same, or if it were not necessary, or if it did not appear to him, as a reasonably careful, prudent, and cautious man, necessary to protect his life, or to protect himself from great bodily injury or harm, to inflict painful or hurtful wounds or other injury upon the said Lewis Leits, then he would not be authorized, under the law, in self-defense, to have inflicted such painful or hurtful wounds or other injury upon the said Lewis Leits. In determining whether an assault, if any, was made in such a manner by Lewis Leits as would authorize the defendant in self-defense, as hereinbefore defined,*

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to inflict upon the said Lewis Leits painful or hurtful wounds, if any, or to inflict upon him any injury, you should take into consideration the relative strength of the two contending parties; the nature and character of the assault, if any, made by Lewis Leits upon the defendant; whether made with arms or weapons of some kind, or whether made simply with the hands or fists; the feeling existing between the parties at the time of and prior to the assault; the character and number of blows given by the defendant, if any; and all the other surrounding facts and circumstances disclosed and shown by the evidence in this case."

The complaint made of this instruction is that it limits the right of defendant to act in self-defense to cases where he is in reasonable fear of losing his life or of suffering great bodily harm, at the hands of his adversary. We have italicised the portions of the instruction to which appellant excepts. A very cursory reading will show that there is good ground for the criticism made. Four times in this single paragraph is the thought repeated that, if Leits assaulted defendant, the latter had no right to defend himself unless it reasonably appeared to him that his life was in danger, or that he was likely to suffer great bodily harm from such assault. As an abstract proposition of law, this statement is incorrect. The rule is elementary that one unlawfully assailed may, in self-protection, repel force with force. The extent to which he may go is to be measured by the character of the assault; but the right, as we have stated it, exists under any and all circumstances. Counsel for the State insist that the instruction may have been correct under the evidence in this case, and that, as the evidence is not before us, we should presume a state of facts justifying the rule given. It does, however, appear in the record, that there was evidence on the part of defendant tending to prove that Leits, armed with a knife, assaulted him, and that defendant, in resistance, struck his assailant with his fists, and with those only. It is manifest that the rule announced is erroneous when applied to any such state of facts.

2. But counsel for the State say that the defendant cannot be heard now to urge an objection to this instruction, because he did not ask that any different rule be given. Where the court

undertakes to give the law to the jury, it is its duty to do so correctly; and a failure in this respect can be taken advantage of by defendant. The rule that counsel have in mind, doubtless, is that where the instructions given are correct, so far as they go, but objection is made that they are not sufficiently specific, such complaint will not be heard, if no more specific requests are submitted. *State v. Viers*, 82 Iowa, 397, 48 N. W. Rep. 732, and cases cited. We know of no rule that requires a party to do more than except to an instruction containing affirmative error, in order to secure its review by this court. For the error complained of in this instruction, the judgment is reversed.

NOTE (by J. F. G.).—*The old common-law offense of assault and battery* is in law deemed to, and should, cover all of those physical encounters occurring under ordinary circumstances, even though the degree of violence be great and the punishment of the victim severe, if no specific intention to destroy life, or to commit a permanent or serious injury, be found. The court of appeals of Kentucky in *Woodson v. Commonwealth*, 21 S. W. Rep. 584, announces substantially this doctrine in the following opinion:

HAZELRIGG, J. The appellant and another negro, Tyler Barnes, who was his intimate friend, met in the back room of a saloon, and had some hot words over a trivial matter. Barnes stepped into the front room, where a white man directed the barkeeper to let him have a drink, hearing which, appellant came forward, and leaned in the doorway of the partition, saying to the barkeeper, by way of asking for a drink, "Boss, what's the matter with me?" He was at once told by Barnes not to come in. He responded that he was not bothering anyone, whereupon Barnes picked up a bar glass, and threw it violently at the appellant, who, however, dodged, dropped back to the stove, picked up an iron poker, came forward, and struck his assailant, knocking him down, and cutting a gash in his head, but, of course, breaking no bones. He dropped the poker, and ran, followed by Barnes. At the following term of court the appellant was indicted for wilfully and maliciously striking and wounding with a deadly weapon, with intent to kill, was convicted of a felony, and sentenced to the penitentiary for two years. He complains of the instructions of the court, by the first one of which the jury was told that if they believed from the evidence, "beyond a reasonable doubt, that the defendant, in Larue county, and before the finding of the indictment read to them, struck the witness Tyler Barnes with an iron poker, with intention to kill said Barnes, they should find him guilty, as charged in the indictment, and fix his punishment at imprisonment in the penitentiary," etc.

Here the court assumes that the iron poker, as used, was a deadly weapon, when that question, considering its size, and the manner of its use, should have been left to the jury. Moreover, it was as necessary that the jury should believe that the striking was done mali-

ciously, as that it was done at all. The jury are told to convict of a malicious striking, and therefore of a felony, although they may have believed the blow to have been inflicted in sudden heat and passion, or in sudden affray, in which event it would have been, in law, a misdemeanor only. No instruction was given as to a sudden affray. The appellant was in fact guilty of a breach of the peace, or, at most, of an assault and battery, provided he did not act in self-defense. The judgment below is reversed, and cause remanded, with instructions to proceed as herein indicated.

SMITH v. STATE.

58 Neb. 531—78 N. W. Rep. 1059.

Decided May 3, 1899.

ASSAULT WITH INTENT: *Information—Intent—Instructions—Evidence insufficient.*

1. The effect of section 17b of the Criminal Code, relative to an assault with intent to inflict great bodily injury, was to create a new and substantive crime,—one purely statutory; and it is sufficient, in an information, to charge the crime in the language of the statute, without a statement of the means with which the assault was committed. *Smith v. State*, 34 Neb. 689, 52 N. W. Rep. 573; *Murphey v. State*, 43 Neb. 34, 61 N. W. Rep. 491.
2. The term "assault," used without qualification, has a clear and established import in criminal law.
3. Whether the particular intent elemental of a charge of assault with intent to inflict great bodily injury has been shown is generally a question of fact for the jury.
4. It is not available matter of complaint, for a person at whose request a jury has been instructed on a specific point, that the court gave an instruction on his own motion on the same subject.
5. The verdict held not warranted and sustained by the evidence.
(Syllabus by the Court.)

Error to District Court of Butler County; Sedgwick, Judge. Clinton Smith, being convicted of assault with intent to do great bodily injury, brings error. Reversed.

E. R. Dean, for the plaintiff in error.

C. J. Smyth, Atty. Gen., and *W. D. Oldham*, Dep. Atty. Gen., for the State.

HARRISON, C. J. An information was filed in the district court of Butler county which contained two counts, in the first

of which the plaintiff in error was charged with an assault upon Charles T. Jenkins with intent to kill and murder him; and in the second count the accusation was of an assault upon the same person with intent to do him great bodily injury. The accused, on arraignment, pleaded not guilty; and a trial resulted in a verdict of his guilt of the charge in the second count of the information, and not guilty as to the first. The sentence was of imprisonment in the penitentiary for a term of one year.

It is urged that the information is insufficient. This refers to the count of the charge in which the accused was determined guilty. The offense was charged in the language of the statute. The exact question here raised was under consideration, and was the subject of decision, by this court, in the case of *Murphy v. State*, 43 Neb. 34, 61 N. W. Rep. 491, and it was then announced that a complaint in which the offense was alleged in the language of the statute was sufficient. We are now satisfied that the correct rule was then stated, and will adhere to it.

It is argued that section 17*b* of the Criminal Code, upon which the prosecution was based, is defective, in that in outlining the offense the word "assault" is used, and the acts which will constitute it are not set forth, and, further, that an "assault" is not specifically defined in our Code. The word "assault" has an exact and well-known general import, when used in the sense in which it appears in the section of the Criminal Code to which reference has been made. The applicable definition is given in the text-books on Criminal Law and the law dictionaries. The signification which it has in criminal law is the one which must be accorded it in the portion of the statutes herein drawn into actual use.

It is contended that the trial court erred in the submission in its instructions to the jury of the question of the guilt or innocence of the accused of the crime charged in the first count of the information, for the reason that there was no evidence which tended to support the allegations of said first count. For the accused there was requested and given an instruction which challenged the attention of the jury to the guilt or innocence of the party on trial of the crime alleged in the first count of the information. This being true, he cannot be heard to complain that the court directed the attention of the jury to the same

subject. *Richards v. Borowsky*, 39 Neb. 774, 58 N. W. Rep. 277; *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. Rep. 122; *City of Omaha v. Richards*, 40 Neb. 244, 68 N. W. Rep. 528.

It is strenuously urged that the evidence is insufficient to sustain the verdict. Relative to the main elemental facts of the occurrences upon which the charge of the information was predicated, there was no conflict in the evidence, but of some of the incidents or acts there were disagreements or differences. We have given the evidence a careful examination, and do not deem it necessary to quote from it, or summarize all of it here. We will but refer specifically to a few of the main facts. It appeared that the accused and his son had, each in charge of a team of horses, gone from the farm to the market with a load of wheat, and were returning home, when they discovered two parties (one of them, Charles T. Jenkins) leading and driving along the highway some live stock (cows and colts), of which the accused evidently claimed ownership or right of possession. He told the son to follow the parties and keep them in sight. He went home, unhitched the team, hitched one horse to a road cart, in which he had placed, or had procured it to be done, a shotgun, jumped into the cart, and drove along the road after the parties who had the stock, until he overtook them, when he alighted from the cart, took therefrom the shotgun, and accosted Jenkins, who was walking along the highway behind the stock, in the following language (this is of the accused's testimony): "I says, 'Where are you going with this stock,' I says, 'you black son of a bitch?'"—and demanded that the stock be released. There was more similar language on the part of the accused, but no direct verbal threats of the doing of any specific acts. Smith punched Jenkins on the legs and in the sides with the barrel end of the gun. Jenkins expressed himself as not being able to stand "that kind of an argument," and the stock was released. Smith (so Jenkins stated) then said, "Now, you son of a bitch, take this stuff back where you got it," and commenced "jabbing" him again with the gun; and it further appears that during the continuance of the affair, at a time when Jenkins had hold of the gun, the accused used his fist, and struck Jenkins a number of times on the head and in the face. The foregoing will serve to convey a general idea of what happened at the time

it is alleged in the information herein that the crime of which he was adjudged guilty was committed by the plaintiff in error. The main point is in regard to the appearance of the intent on the part of the accused to inflict great bodily injury upon the party alleged to have been assaulted with such intent. It has been stated by this court: "The term 'great bodily injury,' as there employed [referring to the statute], is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery, and whether a particular case is within the meaning of the statute is generally a question of fact for the jury." *Murphey v. State, supra*. See, also, a discussion of the subject of intention in the opinion in *Krchnavy v. State*, 43 Neb. 337, 61 N. W. Rep. 628. A careful consideration of all the evidence convinces us that there was not sufficient therein to warrant the finding by the jury that there was existent the intent which is a requisite of the statutory crime, of the guilt of which the verdict convicted the accused. The record before us discloses an aggravated assault and battery by him, but not an assault with intent to do great bodily injury. Hence the sentence must be reversed, and the cause remanded. Reversed and remanded.

MOZEE v. STATE.

Texas Court of Crim. App.—51 S. W. Rep. 250.

Decided May 3, 1899.

ASSAULT WITH INTENT TO MURDER: *Specific intent—Self-defense—Provoking difficulty.*

1. Where the defendant, in order to obtain an explanation regarding a statement made, seeks another and engages in a conversation, in which abusive and vulgar language is addressed to the defendant, such language is no defense to the charge of *assault to murder*, if in a homicide charge they would not reduce the offense to manslaughter.
2. It is not assault with intent to murder to fire a shot in the direction of a person, simply for the purpose of scaring him.
3. It is not error to refuse an instruction, where the same matter has been amply covered in a charge given by the court.
4. The fact that a person seeks a meeting for the purpose of provoking a difficulty does not deprive him of the right of self-defense.

Appeal from the District Court of Falls County; Hon. S. R. Scott, Judge.

Wiltz Mozee, being convicted of an assault with intent to murder, appeals. Reversed.

Z. I. Harlan, for the appellant.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; and he appeals.

In order to understand the various questions raised by appellant, it is necessary to give a statement of the evidence. Chester Allen, the injured party, testified: That on Saturday, before the trouble, a woman whom he was courting, named Adeline Givens, borrowed a horse from him to ride to town, and wanted witness to go with her, but he could not, and asked appellant to let her go with him, to which appellant agreed, and they went to Marlin together on that evening. It was late in the night when they got back, and the next day appellant was telling it around that he kept her out in the woods until that time. Witness was boarding with appellant at the time, and did not like that, and quit boarding with him, and moved into a house with Dan Sanders, about three or four hundred yards from appellant. The day before the trouble, appellant's wife passed where witness was living, and asked witness why he had quit boarding with them, and witness told her. On June 27, 1897, the day of the assault, witness was at home, and appellant's little girl came down and told witness that her father said for witness to come up there. Witness did not tell her whether he would come or not, and the girl went back home. Witness got up, and went down to water his horse at a well near by; and, before he returned, appellant, his wife, and a woman that was staying with appellant (Petsy Shaw) were standing in front of witness' house. Witness went up, and appellant spoke to witness, and asked him what he had been telling his wife about him and Adeline Givens; and witness started to tell him, and defendant stopped him, and would not permit him to tell it, and said he had come down there to kill witness, and was going

to do it, and immediately picked up a brickbat, and threw it at witness with all his power. Witness stooped down and picked up a rod of iron near by, and, when he did so, Dan Sanders spoke to witness, and said, "Put it down;" that defendant had a pistol. And witness looked around and saw his pistol, and he and Dan Sanders were scuffling over it. Witness at once dropped the iron, jumped over the woodpile, and ran in the house. Appellant either got loose from Sanders or was turned loose, and came to the door and repeated several times that witness had as well come out; that he had come to kill him, and was going to do it. Witness got an old gun in the house and came to the door, and presented it at the defendant and snapped it, and it failed to fire. Appellant then fired at witness with his pistol, the ball striking the edge of the door, near where witness was standing. Appellant said to witness that he knew the old gun witness had would not fire. Dan Sanders caught defendant when he fired. Appellant testified: "That on the day of the trouble my wife got after me about what Chester Allen had been telling her about me and Adeline Givens, and said that he told her I kept Adeline Givens out in the woods the night we went to town, and had intercourse with her. I told her I would go to see him about it, and my wife, Betsy Shaw, and myself went down there; and when we got there I told Chester Allen that I had come to talk to him about what he was telling my wife about me and Adeline Givens. He got mad and said: 'Yes; you did do it. You know you did do it. You know you f—d her.' I told him to hush; that I had come down there to talk with him, and not to have trouble. He kept on, and picked up a brickbat and threw it at me. I picked up one and threw it at him. He then picked up a rod of iron, and Dan Sanders got him and made him lay it down. He then ran in the house and got a gun. I then pulled out my pistol, and he snapped the gun at me, and I shot off my pistol. I did not shoot at him, but shot to scare him. I did not try to shoot him any more. I did not have intercourse with Adeline, and the reason that we were so late was because it rained, and we could not get home sooner. I did not say anything to Allen about coming down there to kill him." The statements of these two witnesses

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present, in substance, the testimony offered by the State and the defense.

Appellant's first assignment of error is "that the court erred in not giving to the jury special charges Nos. 1, 2, and 3 requested by him, as shown by bill of exceptions No. 1." The first charge is: "You are further charged that, if you believe that Wiltz Mozee went to the house of Chester Allen for the purpose of pacifying his wife; that, after he got there, Chester Allen used such language in the presence of himself and family as was reasonably calculated and did enrage defendant to such an extent that he was incapable of cool reflection at the time the shot was fired,—you will find the defendant not guilty as charged." We do not think there is any evidence in the record raising the issue contained in appellant's charge. There was no insult to a female relative, or about a female relative, such as would reduce the killing from murder to manslaughter; and, as appellant had gone down there for the purpose of ascertaining what Chester Allen said, he certainly could not say that, because he told him what he had heard him say, the assault should be reduced from assault with intent to murder to aggravated assault by sheer force of the fact that part of the language used by Allen in restating what he had previously stated was vulgar and obscene language.

Appellant's second requested charge is as follows: "You are further charged, if you believe from the evidence that defendant shot at Chester Allen for the purpose of bluffing or scaring the witness, and not with the specific intent to kill, you cannot convict him of the offense charged." We think the court should have given a charge presenting the issue of shooting to scare the injured party. If appellant shot to scare Chester Allen, with no intent to injure him, but simply to scare him, he could not, under our law, be guilty of an assault with intent to murder. It is not for us to say whether the facts proved this or not. Appellant had sworn positively that he did shoot for the purpose of scaring Allen.

Appellant's third requested charge is as follows: "You are further instructed by the court that, before you can convict defendant of the charge as set out in the indictment, you must

believe that defendant was actuated by malice, as malice is defined in the main charge, in committing the assault, if any." We think this charge was amply covered in the court's charge.

Appellant's seventh assignment of error is: "The court erred in its charge to the jury upon the subject of 'provoking the difficulty,' because the issue was not fairly raised upon the trial, and was prejudicial to appellant." Without discussing the evidence in detail, we believe that the issue of provoking the difficulty was presented, arising naturally out of the evidence as contained in the record.

The eighth assignment of error is: "The court erred in its charge to the jury upon the subject of provoking the difficulty, in that the court failed to indicate from the evidence what the act of provocation is, and define its effect and bearing upon the case, and to explain to what extent such act thus indicated would limit or abridge defendant's right of self-defense, but left the jury to speculate and conjecture as to the nature and quality of such act, and the extent of its limitation and abridgment of defendant's right of self-defense as is shown by bill of exceptions." We have frequently held that, where the evidence raises the issue as to provoking the difficulty, it is the duty of the trial court to tell the jury the circumstances indicated by the evidence raising the issue of provoking the difficulty. In *Abram v. State*, 36 Tex. Cr. R. 46, 35 S. W. Rep. 390, the court said: "The court should have instructed the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendant and deceased were engaged in a verbal altercation; that the deceased ordered him to dry up or go off, or else he would make him; that they got into a quarrel, each party engaged in cursing the other; and that the defendant with a knife, being a deadly weapon, stabbed deceased and killed him with malice aforethought,—that he would be guilty of murder," etc. Upon referring to the court's charge, we find that the court charged, in substance, as follows: "Unless you further believe from the evidence, beyond a reasonable doubt, that defendant sought the meeting with the said Chester Allen for the purpose of provoking a difficulty with said Chester Allen with intent to take the life of the said Chester Allen, or do him such serious bodily injury that might probably end in the death of the said

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Chester Allen, and if you so believe from the evidence beyond a reasonable doubt, then you are instructed that, if the defendant sought such meeting for the said purpose and with such intent, the defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter be compelled to act in his own self-defense." We have never held "that the mere fact that a party sought a meeting for the purpose of provoking a difficulty" would deprive him of the right of self-defense, but we have uniformly held that the party must not only seek the meeting, but do some act or acts indicating the desire to bring on the difficulty, and thereby cause death or serious bodily injury to his adversary. The mere seeking of a party for the purpose of bringing on a difficulty, as stated, is not the gist of the offense, but it is doing the acts that produced or provoked the difficulty that deprives him of the right of self-defense. We think the court's charge is subject to the criticism urged by the able brief of appellant's counsel. White's Ann. Pen. Code, par. 1188; Id., par. 1281, § 4; *Morgan v. State*, 34 Tex. Cr. Rep. 222, 29 S. W. Rep. 1092; *Abram v. State*, 36 Tex. Cr. Rep. 44, 35 S. W. Rep. 389; *Carter v. State*, 37 Tex. Cr. Rep. 404, 35 S. W. Rep. 378; *Winters v. State*, 37 Tex. Cr. Rep. 582, 40 S. W. Rep. 303. For the error of the court in failing to give the charge above commented upon, and the further error in not properly defining what the court meant by "provoking the difficulty," the judgment is reversed and the cause remanded.

CHAVANA v. STATE.

Texas Court of Crim. App.—51 S. W. Rep. 380.

Decided May 31, 1899.

ASSAULT WITH INTENT: *Necessity of instruction as to grades of the offense—No intent to destroy life.*

In a trial upon an accusation of assault with intent to commit murder, the evidence not showing any fixed malice or apparent desire to destroy life, but that the defendant while intoxicated, using a knife, with a blade one and one-half inches long, inflicted a wound only one-half inch in depth, the court should have instructed the jury as to the law relating to aggravated assaults.

Appeal from the District Court of Webb County.

Manuel Chavana, being convicted of assault with intent to commit murder, appeals.

Robert A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence his appeal.

The only question presented is an exception taken to the action of the court in failing to give a charge on aggravated assault. The circumstances connected with the assault are very few. They merely show that defendant, prosecutor, and several others were returning home from a dance at night; prosecutor and defendant both being somewhat under the influence of liquor. Defendant lagged behind the parties a short space, and called to prosecutor to come back. He turned around and stepped towards defendant, who immediately stabbed him in the right breast, and then ran. The doctor states that the wound was a half to three-fourths of an inch in depth, and that the prosecutor lost a great deal of blood from it; that it would probably have been a fatal wound, if in a different portion of the body; he was in bed some eight days, suffering from the effects of the wound. The witnesses describe the knife as being a pocket-knife, with a narrow blade, about an inch and a half long. The testimony of all the witnesses is about to the same effect. The court instructed the jury that appellant must have entertained the specific intent to take the life of the prosecutor, before they could convict him of an assault with intent to murder, and further charged them, unless they found that he did have the specific intent to kill prosecutor, to acquit him, but failed to give a charge on aggravated assault. Under the circumstances, we believe the court should have given a charge on aggravated assault. There was no grudge shown between the parties, and the assault was not followed up. Defendant appears to have merely stuck the knife in prosecutor to the depth of a half inch, when he might have run it in an inch and a half, and then not only failed to follow it up, but, without interference, ran off. As it was, the jury found him guilty of assault with intent to murder, and gave him the lowest punish-

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ment. If the court had given a charge on aggravated assault, the jury might have found him guilty only of that offense. We would not be understood, however, as holding that we would not sustain a verdict for an assault with intent to murder, but we do say that the court should have given an instruction on aggravated assault. The instruction to acquit if the jury found that defendant did not entertain the specific intent to kill was clearly misleading, because there was no question that the assault was unlawful. The judgment is reversed, and the cause remanded.

NOTES (by J. F. G.).—*Elements of the offense.*—Two essential elements are necessary to constitute assault with intent to commit murder: (1) The assault must be committed with that degree of malice, premeditation, and deliberation, that if death ensues therefrom, the offense, if any, would be murder, and not manslaughter; (2) The assault must be made with the actual desire to destroy life. The object of statutes of this nature is not to make felony of that class of assaults where the natural and probable result would be the death of the person assaulted; but where the assault is made with the actual intention to produce such results. If a man taking deliberate aim fires at another with the intention of wounding him in the arm, but the bullet pierces the heart and death ensues, the offense might be murder; because, death being produced by an unlawful act, the law presumes malice and that the party firing the shot intended the natural and ordinary consequences of the act; but if the wound is made as contemplated, and without just excuse, the offense might be an assault with intent to commit a serious bodily injury, but not assault with intent to commit murder, unless the circumstances indicate such intent. In the *Chavana Case* the fact that the defendant had the present ability to commit a more serious injury, and did not, is a very strong circumstance indicating the absence of an intention to destroy life.

Review of authorities.—The authorities supporting this view of the subject are numerous. But a few of them will here be briefly noted.

The case of *People v. Roberts*, 19 Mich. 401, is a leading case upon the subject of specific criminal intent as applied to assault to commit murder. In that case, in reversing a conviction, the court said: "The first question presented by the record is whether, under this information, the jury could properly find the defendant guilty of the assault with the intent charged, without finding, as matter of fact, that the defendant entertained that particular intent? We think the general rule is well settled, to which there are few, if any, exceptions, that when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as matter of fact, before a conviction can be had. But especially, when the offense created by the statute, consisting of the act and the intent, constitutes, as in the present case, substantially an attempt to commit some higher offense than that which the defendant has succeeded in accomplishing by it; we are

aware of no well-founded exceptions to the rule above stated. And in all such cases the particular intent charged must be proved to the satisfaction of the jury; and no intent in law, or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter. *Rex v. Thomas*, 1 East, P. C. 417; 1 Leach, 330; *Rex v. Holt*, 7 Car. & P. 518; *Cruse's Case*, 8 Car. & P. 541; *Reg. v. Jones*, 9 id. 255; *Regina v. Ryan*, 2 Mood. & R. 213; *Rex v. Duffin*, Russ. & Ry. 364; *Ogletree v. The State*, 28 Ala. 693; *Maher v. The People*, 10 Mich. 212; *People v. Scott*, 6 Mich. 296 (per Campbell, J.); *Roscoe*, Cr. Ev. 775, 790; 1 Bish. Cr. L., §§ 666, 667."

In *State v. Neal*, 37 Me. 468, the court held that the presumption that every person intended the natural and ordinary consequences of his or her act applies to cases of homicide; but where the offense charged was assault with intent to murder, "the intent charged which forms the gist of the offense must be specially proved."

In *Botsch v. State*, 43 Neb. 501, 61 N. W. Rep. 730, the court said: "That a natural intent to take life is an essential element of the crime of assault with intent to commit murder is the well-established, if not uniform, rule."

In *Moore v. State*, 26 Tex. App. 332, the court said: "In order to constitute the offense of assault with intent to murder, two things must occur: first, an assault; and second, a specific intent to kill. Without a simultaneous concurrence of these two constituent elements, there can be no assault to murder. No intent save the specific one to kill will be sufficient."

In *Morgan v. State*, 33 Ala. 413, the court said: "The defendant was not guilty as charged, unless he committed the assault, and this act was done with special intent to kill and murder the person assaulted;" citing *Ogletree v. State*, 28 Ala. 693. In this latter case the court said: "If the defendant made an unlawful assault on Tiller, with malice and with an actual intent to murder him, he is guilty of a felony; otherwise he is not guilty of a felony." Both of these cases were cited with approval in *Walls v. State*, 90 Ala. 618.

In *Harrison v. State*, 85 Ga. 131, 11 S. E. Rep. 62, 21 Am. St. Rep. 152, the court said: "Where death takes place from unlawful violence, malice includes an intention to kill. Code, § 4321. But where death does not take place, there may be malice in giving the wounds, but utter absence of intention to kill."

The general term "assault with intent to commit murder" does not include assault with intent to commit manslaughter.—The following is the report in full in *Moore v. People*, 146 Ill. 600, 25 N. E. Rep. 166:

At the November term, A. D. 1892, of the Morgan county circuit court, an indictment was returned into open court of that county by the grand jury, charging the plaintiff in error with an assault with intent to commit murder, and at the same term he was arraigned, tried, and convicted, and his punishment fixed at imprisonment in the penitentiary for the term of five years. A motion to set aside the verdict and for new trial was entered at the same term, which was granted, and cause continued. At the May term, A. D. 1893, of the circuit court of that county the plaintiff in error was again tried on the same indict-

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ment before a jury, and a verdict was returned into court finding the defendant guilty of an assault with intent to commit manslaughter, and fixing his punishment in the penitentiary for the term of one year. A motion to set aside the verdict and for a new trial was entered by the defendant, which was overruled by the court, and thereupon the defendant entered his motion in arrest of judgment, which was also overruled, to which exception was taken, and judgment was entered on the verdict, and the defendant sentenced to imprisonment in the penitentiary for the term of one year. Thereupon this writ of error was sued out, and the error assigned is the overruling the motion in arrest of judgment, and entering judgment on the verdict finding the defendant guilty of an assault with intent to commit manslaughter under the indictment.

PHILLIPS, J. This indictment was found under the forty-fifth section of the Criminal Code, which provides that "an assault with intent to commit murder, rape, mayhem, robbery, larceny or other felony shall subject the offender to imprisonment in the penitentiary for a term not less than one year nor more than fourteen years." To constitute the offenses, or any of them, as defined in this statute, the intent must be established; and, while not necessary that that shall be done by direct evidence, such as threats and the like, as it may be inferred from the facts and circumstances proven, yet the specific intent is necessary to complete the offense. An assault with intent to commit murder, rape, mayhem, robbery or larceny is one which necessarily depends on deliberation, and, as all these offenses, which are specifically named by that section, are those which require deliberation or premeditation, it becomes a question of construction whether the term "or other felony" can include any offense other than one committed with deliberation or premeditation. When a section, so far as it particularizes, has reference entirely to offenses committed with a deliberate intent, general language, referring to any other felony in like manner, has reference to offenses committed with premeditation or deliberate intent; that is, with what is included as legal premeditation or deliberation. By section 143 of the Criminal Code of this State manslaughter is defined as follows: "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever." To reduce the felonious killing of a human being from murder to manslaughter there must be no implication of malice from facts and circumstances proven, and there must be no deliberation whatever. Where a deliberate intent must be found to exist to constitute the act criminal, it is impossible that it should be found to exist without reflection or premeditation. In this case the intent with which the assault was committed is a necessary fact to be shown or implied to constitute the crime. When it appears there was an intent to take life, either express or implied, where the killing would not be excusable or justifiable, and an assault is made with that intent, then it would be an assault with intent to commit murder. It would follow, therefore, that for one to assault another with intent to commit manslaughter, would be a contradiction in terms. *People v. Lilley*, 43 Mich. 521, 5 N. W. Rep. 982. It was error to overrule the

motion in arrest of judgment. The judgment is reversed, and the cause is remanded.

(The indictment was on section 23 of the Criminal Code, which is section 45 in Starr & Curtis' edition.)

GEE V. STATE.
STATE V. SLAVENS.

60 Ohio St. 485—55 N. E. Rep. 43.

Decided June 13, 1899.

BASTARDY: Evidence of the finding in a civil case.

On the trial of the issues joined by a plea of not guilty to an information or an indictment charging the defendant with unlawfully and negligently failing to support his illegitimate child, the record of a bastardy proceeding instituted by the mother of the child, in which the defendant was adjudged to be its father, is not admissible in evidence.

(Syllabus by the Court.)

In former case, error to the Circuit Court of Cuyahoga County.

In latter case, exceptions to decision of Common Pleas Court of Scioto County.

In the former case Gee was convicted in the police court of the city of Cleveland upon an information which charged him with unlawfully, negligently and wilfully depriving his illegitimate child of necessary food, clothing and shelter. Upon the trial of the issues joined by the plea of not guilty, the record of a civil proceeding under the bastardy act was, against the objection of defendant, admitted to establish his paternity of the child which was alleged to have been neglected by him. The sentence of the police court was affirmed by the court of common pleas and the circuit court, and this petition in error is for the reversal of the judgments of the three courts for the admission of said evidence.

T. J. Ross, for plaintiff in error.

Albert T. Holmes, for defendant in error.

In the second case Slavens was placed on trial in the common pleas court of Scioto county upon an indictment charging him with neglecting and refusing to support his illegitimate child. Upon the trial the prosecuting attorney offered in evidence the record in a proceeding under the bastardy act instituted upon the complaint of the mother, in which Slavens was adjudged to be the reputed father of the child. This record was excluded by the court on objection by the defendant's counsel, and the prosecuting attorney excepted. The cause is before us upon that exception.

Henry Bannon, for the State.

Noah J. Dever, *contra*.

BY THE COURT. The record offered is not competent under the general rule that in a criminal proceeding the record of a civil action cannot be introduced to establish the facts on which it was rendered. The judgments offered followed verdicts which might have been lawfully returned upon a mere preponderance of evidence. A higher degree of evidence was required to convict under the indictment and the information. *Greenl. on Ev.*, sec. 437; *Britton v. The State*, 77 Ala. 202; *Riker v. Hooper*, 35 Vt. 457.

In the former case the judgments of the courts below are reversed. In the latter the exception is overruled.

REYNOLDS v. STATE.

58 Neb. 49—78 N. W. Rep. 483.

Decided February 23, 1899.

BIGAMY: Void marriage—Competency of evidence as to death.

1. A married person will not be absolved from the bonds of matrimony by believing, even upon information apparently reliable, that the marriage has been dissolved by death or divorce. Public policy forbids that the permanence of the marriage relation should depend upon anything so precarious as the mental state of one of the parties.
2. Whether, in a prosecution for bigamy, an honest and reasonably grounded belief entertained by the defendant in the death of an absent spouse is of itself a complete defense, *quære*.

3. In a prosecution for bigamy it is prejudicial error to permit the State to re-enforce a disputable presumption in regard to the capacity of one of the parties to contract a valid marriage by the introduction of incompetent evidence directly bearing upon the question.
4. To prove a divorce, the record of the decree, or a duly authenticated copy thereof, is the appropriate and only competent evidence.
5. In the absence of an exception, a ruling made by the district court during the progress of the trial cannot be reviewed.
6. When a reputable presumption, possessing no inherent probative force, is met by opposing evidence, it is entirely destroyed, and ceases to be a factor in the trial, unless it be required to turn an evenly balanced scale.

(Syllabus by the Court.)

Error to District Court of Hayes County; Norris, Judge.

Frederick D. Reynolds, being convicted of bigamy, brings error. Reversed.

J. L. McPheely and *E. F. Ferris*, for the plaintiff in error.

C. J. Smyth, Atty. Gen., and *W. D. Oldham*, Dep. Atty. Gen., for the State.

SULLIVAN, J. The defendant, Frederick D. Reynolds, was convicted of bigamy, and sentenced to imprisonment in the penitentiary for a term of seven years. He was found guilty on the first count of the information, which charges a first marriage with Jennie Ford in Beaverhead county, in the State of Montana, in February, 1895, and a second marriage with Lizzie J. Caulk, in Hayes county, Nebraska, in July, 1897. The solemnization of both marriages, as alleged in the information, was shown by competent evidence, and was admitted by the defendant while testifying as a witness in his own behalf. The hypothesis upon which the defense was conducted was that the Montana marriage was void, for the reason that both the contracting parties were at the time bound by prior matrimonial alliances, and so lacking in legal capacity to marry, or live in lawful wedlock. Jennie Ford, being produced as a witness for the State, on cross-examination gave testimony from which it appears that she, as well as the defendant, was incorrigibly addicted to matrimony. She testified that she married J. J. Jor-

don at Vinton, Iowa, in 1883; that she married Frank Ford in Chicago, in 1884; and that, at Dillon, Montana, in August, 1892, she was wedded to Mack S. Purman. At the conclusion of the cross-examination she was dismissed by the State, but was subsequently recalled, and, over defendant's objection, testified that at the time she married Reynolds all of his predecessors in marital right were dead. She also testified that she had obtained a divorce from Purman in 1893. During the course of a further cross-examination it was developed that the only information the witness possessed in regard to the death of Purman was derived from a letter written to her by some one in Kansas City, whereupon the defendant moved to strike out the testimony. The motion was denied for the reason suggested by the following remark of the judge who presided at the trial: "An honest belief of the death of a husband or a wife, together with some reasonable ground for their believing it, would be a good excuse. I believe on that ground it ought to be overruled." The motion should have been sustained. The mere reception of the letter did not render the witness an eligible candidate for matrimony. Neither reason nor authority sustains the position of the trial court upon this question. There are, it is true, cases which hold that an honest belief in the death of a former husband or wife, when such belief is reasonably grounded, is a defense to a prosecution for bigamy; but, if the doctrine of these cases is sound,—which we do not concede,—it has no application whatever to the facts of this case. The witness was not on trial. Her intent, whether criminal or innocent, was not in issue, and therefore her belief touching the contents of the letter was wholly immaterial. A married person cannot become absolved from the bonds of matrimony by believing, even upon information apparently reliable, that the marriage has been dissolved by divorce or death. Public policy forbids that the permanence of the marriage relation should depend on anything so precarious and elusive as the mental state of one of the parties. But it is contended by the attorney-general that the refusal of the court to sustain the motion was not prejudicial error, because the law would presume, in favor of the innocence of Jennie Ford, that Purman was dead at the time she contracted the marriage with Reynolds. The better opinion seems to be that

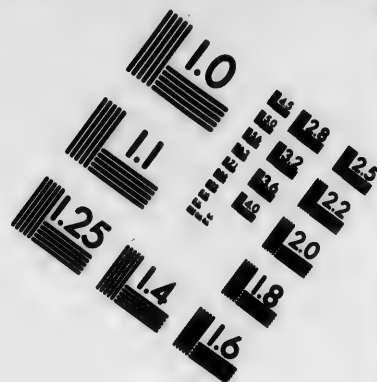
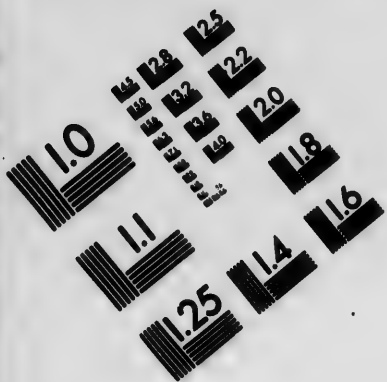
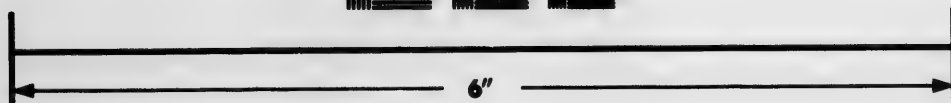
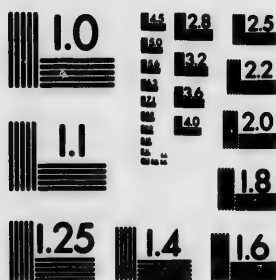


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there is in such case no absolute and inflexible presumption, but that the question is to be determined by the jury from all the facts in the case. *Williams v. Williams*, 63 Wis. 58, 23 N. W. Rep. 110; *Town of Northfield v. Town of Plymouth*, 20 Vt. 582; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. Rep. 232; *Rex v. Inhabitants of Harborne*, 2 Adol. & El. (Eng.) 540. But, conceding that the presumption of innocence should be indulged notwithstanding the reasonable and probable presumption of life, it does not follow that there was not prejudicial error in submitting to the jury the evidence against which the motion was directed. There was evidence in the case that Purman was seen alive and well at Evans, Colorado, in 1897. This evidence destroyed the presumption of his death, and left the question for the jury to determine upon a consideration of all the facts and circumstances proven on the trial. As applied to the facts in this record, the presumption was nothing more than an arbitrary rule. It possessed no inherent probative force. Its value depends upon law, and not upon logic. When it met opposing testimony, it was completely overthrown, and ceased to be a factor in the trial. *Graves v. Colwell*, 90 Ill. 612. This being so, it follows that the court permitted the jury to find that Purman was dead, and to rest their finding upon the testimony of Jennie Ford with respect to the contents of a letter which was neither produced nor accounted for. It cannot be said that this evidence did not exert a decisive influence upon the jury in reaching their verdict. It was palpably incompetent, and should have been rejected. The defendant also complains because Jennie Ford was permitted to give oral evidence of the fact that she had obtained a divorce from Mack S. Purman. The evidence was clearly secondary, and its reception was prejudicial error. If a divorce had been obtained, a duly-authenticated copy of the decree was the appropriate and only legal evidence of the fact. *Com. v. Boyer*, 7 Allen, 306; *State v. Barrow*, 31 La. Ann. 691; *Tice v. Reeves*, 30 N. J. Law, 314; 1 Jones, Ev. 199; 4 Am. & Eng. Ency. Law (2d ed.) 45. This evidence may have influenced the jury to find that Jennie Ford possessed capacity to contract a valid marriage with the defendant. At any rate, it is impossible to say that it did not have that effect. Other rulings of the trial court assigned for error cannot be consid-

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ered, because in some instances appropriate objections were not made, and in others no exceptions were taken. The instructions given seem to be lacking in accuracy of statement, while at least one of the instructions tendered by the defendant and refused by the court states a correct principle, was applicable to the facts, and should have been given. But as there was no exception to the instructions, the assignments in relation to them cannot be considered. It has been suggested, and is doubtless true, that in this case "outraged justice has laid her avenging lash on the back of one who honestly deserves the scourge," but we cannot for that reason alone affirm the judgment. The jurisdiction of the courts is not co-ordinate with that of the mob. The defendant, by his own confession, is an inveterate bigamist; but, notwithstanding that fact, he is, under the constitution and laws of this State, entitled to a fair and impartial trial. Notwithstanding his odious character, he must, like every other person accused of crime, be tried and convicted by due course of law, or else go free. The judgment is reversed, and the cause remanded for further proceedings.

PEOPLE v. MENDENHALL.

119 Mich. 404—78 N. W. Rep. 325.

Decided February 21, 1899.

BIGAMY: Common-law marriage.

It is bigamy for a married person to enter into a common-law marriage, which otherwise would be legal.

Error to Circuit Court of Jackson County; Hon. Erastus Peck, Judge.

Augustus C. Mendenhall, being convicted of bigamy, brings error. Affirmed.

John F. Henigan, for plaintiff in error.

H. M. Oren, Atty. Gen., and *Chas. H. Smith*, Pros. Atty., for the People.

MONTGOMERY, J. The respondent was convicted of the crime of bigamy. The only substantial question raised is whether the

offense is committed by one who, being married, contracts a common-law marriage lacking the formalities which the statute prescribes for the solemnization of marriages. The testimony on the part of the People tended to show that the respondent and the complaining witness, Bertha A. Poyle, entered into an agreement in writing as follows: "I, Augustus C. Mendenhall, do hereby solemnly agree to take Bertha A. Poyle as my wedded wife, to live together in the holy state of matrimony, to love her, comfort her, honor and keep her in sickness and in health, and, forsaking all others, keep her only, so long as we both do live. I, Bertha A. Poyle, do hereby solemnly promise to take Augustus C. Mendenhall as my wedded husband, to live together in the holy state of matrimony, to love, honor, comfort, and keep him in sickness and in health, and, forsaking all others, keep him only so long as we both do live. Augustus C. Mendenhall. Bertha A. Poyle." That this agreement was signed in the presence of witnesses; and that, acting on this agreement, the parties immediately commenced to cohabit as husband and wife, and continued to so cohabit for some weeks, when the complaining witness learned of the former marriage of the respondent. The circuit judge charged the jury: "If you find from the evidence, and beyond a reasonable doubt, that Bertha Poyle entered into the contract in question in good faith, for the purpose of creating the marriage relation between her and Mendenhall, and not for the purpose of establishing or covering up unlawful sexual intercourse between them, and that she did this without knowledge or information that Mendenhall had a prior wife living, from whom he was not divorced, and that the marriage contract so entered into was followed by marital cohabitation, submitted to by her in good faith, supposing she was his lawful wife by virtue of such contract, then you should regard the second marriage charged in the information as sufficiently proven; otherwise, you should not." The respondent's counsel stated his claim as follows: "The presumption of a valid marriage from the circumstances of cohabitation and the declaration of the parties, while it may be conclusive where there is no impediment in the way, yet we apprehend that where, as in this case, there is an impediment, to wit, a first marriage, and that impediment is proven, what is at most lewd and meretricious cohabita-

tion cannot, by a humane presumption of the law, be converted into a predicate for the second marriage required under the statute of bigamy." It is a settled rule in this State that a marriage in fact may be shown by proof of an agreement between two persons of opposite sex to take each other presently as husband and wife, consummated by cohabitation. *Hutchins v. Kimmell*, 31 Mich. 126, 118 Am. Rep. 164; *Clancy v. Clancy*, 66 Mich. 202, 33 N. W. 889; *People v. Loomis*, 106 Mich. 250, 64 N. W. Rep. 18. It follows that such informal agreement constitutes a marrying, within the meaning of section 9280, 2 How. Ann. St. It is none the less a marrying because one spouse is already married. It is true of every case of a bigamous marriage that the second marriage is void; and, as was said in *People v. Brown*, 34 Mich. 339, it is the entering into a void marriage while a valid marriage exists which the statute punishes. In Bish. St. Crimes, § 592, it is said, "In a State where mutual consent alone constitutes matrimony, as with the first marriage, so with the second,—no added formalities need be shown." See also *Hayes v. People*, 25 N. Y. 390. The conviction is affirmed. The other justices concurred.

NOTE.—*Proof of common-law marriage.*—In *Hiler v. People*, 156 Ill. 511, 41 N. E. Rep. 181, a prosecution for bigamy was based on the theory that the first alleged marriage was a common-law marriage. In reversing the conviction, the court said:

"To constitute the offense charged in this indictment it is incumbent upon the prosecution to show against the defendant two successive marriages; one legal and innocent, the other penal. Both must be actual. The first marriage must be valid and binding, and a marriage in fact. Marriage with capacity and consent, proved by direct testimony, as by the evidence of witnesses who saw and heard the marriage celebration performed between the parties, or record evidence, with identification, would be evidence of actual marriage in fact. Under the decisions of this court, a marriage legal at common law is recognized as valid and binding in this State. What constitutes such common-law marriages legal and valid has been recognized by repeated adjudications. To constitute a marriage legal at common law, the contract and consent must be *per verba de presenti*. Or, if made *per verba de futuro cum copula*, the copula is presumed to have been allowed on the faith of the marriage promise, and that as the parties at the time of the copula accepted of each other as man and wife. *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hopworth*, 98 Ill. 126; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. Rep. 737. Under the evidence in this record it is not shown that any marriage ceremony was performed. No actual marriage in fact is proven between the defendant and Lizzie

Myers. The evidence discloses the fact that the defendant and one Lizzie Myers lived together as husband and wife, etc., spoke of and introduced each other to others, and letters from the defendant to her so designated her as his wife. They were by repute husband and wife during this cohabitation. On many questions, cohabitation and repute are adequate evidence from which marriage is presumed. For the determination of many cases, declarations, whether verbal or in writing, with evidence of cohabitation and repute, are adequate evidence of marriage. The manner in which persons living together as husband and wife are received among their friends and neighbors as being married, their reputation and declarations, most commonly spring from the fact of cohabitation. As expressed by Mr. Bishop in his work on Marriage, Divorce and Separation (vol. 1, § 939), they 'are shadows attending on cohabitation, and they should be simultaneous therewith.' On the trial of any issue involving the question of marriage all these shadows of and resulting from cohabitation may be introduced in evidence. From the fact of cohabitation, with the attendant shadows, for many purposes there follows the presumption of marriage. This presumption increases through the lapse of time through which the parties are cohabiting as husband and wife. In this record, there is no actual marriage in fact proven, no proof of a contract *per verba de presenti*; nor is there any evidence *per verba de futuro cum copula*. In the absence of such evidence, there remains in this record only evidence of cohabitation with its attendant shadows, from which springs a presumption of marriage. The marriage to Grace Washburn as an actual marriage in fact is shown. Cohabitation and its attendant shadows are shown. Two cohabitations are proven from the evidence, from the first of which a marriage of the defendant to Lizzie Myers would be presumed, and from the second of which the marriage of the defendant to Grace Washburn would be presumed; and in the absence of proof of a contract *per verba de presenti*, each presumption is similar; the first establishing a marriage, the second disavowing the presumption of such first marriage. Where a marriage legal at common law is sought to be shown on which to base a conviction for bigamy, all the elements necessary to constitute such common-law marriage must be proven. There must be evidence of a contract *per verba de presenti*, with proof of cohabitation. In prosecutions for bigamy direct proof of the fact of marriage is required. *Harman v. Harman*, 16 Ill. 85. Where proof of marriage legal at common law is sought to be shown, it must be absolute proof of marriage. *Hayes v. People*, 25 N. Y. 390."

REGINA v. HISTED.

19 Cox's Crim. Cases, 16 (1898).

BIGAMY: ADMISSIONS: *Methods of obtaining them.*

1. Prisoners must be dealt with fairly. The police have no right to put questions to entrap them into making admissions.
2. They should ask no questions of a prisoner without first giving him the usual caution.
3. If these principles are ignored, the court should exclude the admissions.

This was a case tried before Sir Henry Hawkins at Lewes, at the Summer Assizes in 1898.

The prisoner, Jane Elizabeth Histed, was charged with bigamy.

Chambers, Q. C., prosecuted, and at the request of the judge *Harvey Murphy* defended.

The evidence against the prisoner was as follows:

The Rev. Thomas Cobb, vicar of Stockbury, in Kent, produced his register of marriages, which contained an entry of the marriage of one Charles Histed to Jane Elizabeth Allen on the 4th day of September, 1886. He failed to identify either of the parties as the parties he had married, and it appeared by the depositions that the answer the witness had made before the committing magistrates was this: "I cannot recognize either of the parties now." Prior to giving this answer he had been taken by the police to the police station to look at the prisoner.

Leonard Parker, an Eastbourne detective, said that on the 23d day of February he took the prisoner into custody in Kent. He read the warrant to her. She corrected the date of the 9th day of September which appeared on the warrant to the 4th day of September. (This statement did not appear in the depositions.) He then cautioned her. She made no further reply, and he took her to Eastbourne. On the following day (the 24th day of February) the prisoner was brought before the magistrates and remanded till the 4th day of March. On that date witness went to the police station with the last witness, and took him to the charge room to see the prisoner, who was called from the cell. Pointing out the Rev. Mr. Cobb, the detective said to the woman, "Do you know this gentleman?" The answer which

appeared upon the depositions was as follows: "Yes, you are the Mr. Cobb who married me and Charles Histed at Stockbury Church on the 4th day of September, 1886. James Bing was one witness, and a police constable was there named Reeves or Reed."

By his Lordship: Q. Did you caution the woman? A. No, my Lord. Q. What was the object of the question? A. It was simply a remark. Q. Do you really mean to tell me that? A. Yes.

Murphy, on behalf of the prisoner, submitted that a statement obtained in this manner was not admissible evidence.

Chambers, Q. C., in reply.

HAWKINS, J. I shall not allow this question to be put. It is a matter on which I hold a strong opinion. No one, either policeman or anyone else, has a right to put questions to a prisoner for the purpose of entrapping him into making admissions. A prisoner must be fairly dealt with. In this case no caution was given by the detective. The fact was, that to the knowledge of the detective there was no evidence of identity against the prisoner. Mr. Cobb failed to recognize her, and so, by a trick, he endeavored to set the case on its legs again out of her own mouth. This cannot be permitted. In my opinion, when a prisoner is once taken into custody, a policeman should ask no questions at all without administering previously the usual caution.

There being no evidence of identity, prisoner was discharged.

NOTE (by J. F. G.).—The editor of Cox's Criminal Cases in a footnote says that subsequent to the above decision Judge Hawkins' attention was brought to the cases of *Regina v. Gavin*, 15 Cox, C. C. 656, and *Reg. v. Brackenbury*, 17 Cox, C. C. 628, and that he said: "I entirely agree with the ruling of Smith, J., in *Reg. v. Gavin*. Cross-examination of a prisoner by a policeman should not be permitted, and in my discretion I should exclude evidence obtained in that way. The case I have just tried shows exactly the danger of allowing such evidence to be given."

The report in the *Gavin Case* is brief, but instructive, and we give it below in full:

REG. V. GAVIN AND OTHERS.

The prisoner Gavin and three others were indicted for stealing two barrels of oysters from the Lime-street station of the London and

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North-Western Railway Company, at Liverpool, on the 4th day of April, 1885. A number of barrels of oysters had been sent to the station by the importers of them in order that they might be sent off to different parts of the country; and the prisoners, knowing this, had taken a cart from a public stand, driven to the station, and there, on the assertion that they had been sent by the owners of the oysters to take delivery of two barrels, they obtained the oysters which formed the subject of this indictment, and then sold them.

The prisoner Gavin on being taken into custody and charged with the robbery denied all knowledge of it, but subsequently at the detective office he made a statement to the police officer in which he admitted his own guilt and incriminated the other prisoners. The other prisoners when apprehended at first denied all knowledge of the offense charged; but afterwards at the detective office, when confronted with Gavin, and his statement read over to them by the police officer, they said, "Yes, that's all right."

At the trial Gavin pleaded guilty, and on the part of the prosecution—

Segar proposed to put in Gavin's statement as evidence against the other prisoners.

Smith, J., stopped him, and said: When a prisoner is in custody the police have no right to ask him questions. Reading a statement over, and then saying to him, "What have you to say?" is cross-examining the prisoner, and therefore I shut it out. A prisoner's mouth is closed after he is once given in charge, and he ought not to be asked anything. A constable has no more right to ask a question than a judge to cross-examine—for it is practically a cross-examination—nor can he say "— said that, what do you say to it?" for that is in the nature of a cross-examination. Before the prisoner is charged or is in custody he may be asked what he has to say in explanation or in answer to the charge.

Solicitor for the prosecution, *Atkinson*, Town Hall, Liverpool.

LOWERY v. PEOPLE.

172 Ill. 466—50 N. E. Rep. 165.

Opinion filed April 21, 1898.

BIGAMY: Proof—Alleged second wife not a competent witness.

1. *In prosecutions for bigamy both marriages must be proved.*—Where the relation of husband and wife has been assumed, the law generally presumes a lawful marriage; but where two successive marriages are charged in a prosecution for bigamy, the presumption in favor of the legality of each is equal, and an actual first marriage must be proved.
2. *Proof of marriage need not be by the register or certificate.*—In prosecutions for bigamy it is not necessary to prove either of the

- alleged marriages by the register or certificate or other record evidence, but the same may be proved by such evidence as is admissible to prove a marriage in other cases.
3. *Mere proof of cohabitation and reputation does not establish marriage.*—In prosecutions for bigamy, mere proof of cohabitation and reputation as husband and wife is not sufficient to establish an alleged former marriage, in the absence of any admission by the defendant of the fact of such marriage.
 4. *Alleged second wife cannot testify if first marriage is denied.*—An alleged second wife, whose marriage with the defendant charged with bigamy is not controverted, is not competent to testify as to admissions by the defendant concerning the existence of the first marriage, where that is the only controverted question of fact.
 5. *Extent to which alleged second wife is competent as a witness.*—In a prosecution for bigamy, if the first marriage is clearly proved and not controverted, the alleged second wife is competent to testify as to the second marriage, but not the first, and she is not competent at all if the fact of the first marriage is controverted.

Writ of error to the Criminal Court of Cook County; the Hon. Frank Baker, Judge, presiding.

Hillis & McCoy and *Dougald Muir*, for plaintiff in error.

In prosecutions for bigamy both marriages must be proved as alleged. 3 Greenl. on Ev., sec. 204; *Hiler v. People*, 156 Ill. 511; *People v. Lambert*, 5 Mich. 349.

In prosecutions for bigamy a marriage in fact must be proven. *Hiler v. People*, 156 Ill. 511; *Case v. Case*, 17 Cal. 598; *People v. Lambert*, 5 Mich. 349; *People v. Humphrey*, 7 Johns. 314; *Gahagan v. People*, 1 Park. Cr. 378; *Harman v. Harman*, 16 Ill. 88; *Miner v. People*, 58 id. 60; *Miller v. White*, 80 id. 585; *Keppler v. Elser*, 23 Ill. App. 643; *Cartwright v. McGowan*, 121 Ill. 406; 2 Wharton on Crim. Law, sec. 1696; 3 Greenl. on Ev., sec. 204; *State v. Roswell*, 6 Conn. 488; *Commonwealth v. Littlejohn*, 15 Mass. 162.

The first marriage alleged cannot be proved by the confessions or admissions of the defendant, though supported by proof of cohabitation and reputation. *Hiler v. People*, 156 Ill. 519; *People v. Lambert*, 5 Mich. 349; *Gahagan v. People*, 1 Park. Cr. 378; Stephen's Digest, p. 111, art. 53; 3 Greenl. on Ev., sec. 204, note 4; 2 id., sec. 461; *Case v. Case*, 17 Cal. 598; *Hayes v. People*, 25 N. Y. 390; *Commonwealth v. Littlejohn*, 15 Mass. 163; *Hutchins v. Kimmel*, 31 Mich. 126; *State v.*

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Roswell, 6 Conn. 446; *Keppler v. Elser*, 23 Ill. App. 643; *Dann v. Kingdom*, 1 T. & C. 492; 3 Stark. on Ev., 893; 2 id. 781; 1 Russell on Crimes, 186, note, 217, 218; *Morris v. Miller*, 2 Burr. 2056; *Regina v. Flaherty*, 2 C. & K. 781.

In prosecutions for bigamy the alleged second wife should not be admitted to testify if the alleged first marriage is controverted or is not clearly proven. Greenl. on Ev., sec. 339; 1 id., sec. 206, and cases cited; *Miles v. United States*, 103 U. S. 313; 1 Russell on Crimes, 218.

The testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency.

E. C. Akin, Attorney-General, *Charles S. Deneen*, State's Attorney, and *Harry Olson*, Assistant, for the People.

A prior marriage may be proved by the admissions of the accused without the production of the record of a witness present at the marriage. The rule has more frequently, however, been stated as being to the effect that declarations or admissions of the accused as to the prior marriage and proof of cohabitation are sufficient evidence thereof. *Oneale v. Commonwealth*, 17 Gratt. 583; *State v. Johnson*, 12 Minn. 476; *State v. Arming-ton*, 25 id. 29; *Commonwealth v. Hayden*, 163 Mass. 453; *Squire v. State*, 46 Ind. 459; *Crane v. State*, 94 Tenn. 86; *Parker v. State*, 77 Ala. 47; *State v. Wylde*, 110 N. C. 500; *Regina v. Flaherty*, 2 C. & K. 782; *United States v. Miles*, 2 Utah, 19, 103 U. S. 304; *Rex v. Truman*, 1 East's P. C. 470; *Williams v. State*, 54 Ala. 131; *State v. Plym*, 43 Minn. 385; *Wolverton v. State*, 16 Ohio, 173; *State v. Hilton*, 3 Rich. 434; *State v. Britton*, 4 McCord, 256; *Warner v. Commonwealth*, 2 Va. Cas. 95; *Langtry v. State*, 30 Ala. 536; *State v. Seals*, 16 Ind. 352; *Commonwealth v. Murtagh*, 1 Ashm. 272; *Halbrook v. State*, 34 Ark. 511; *Commonwealth v. Jackson*, 11 Bush, 679; *State v. Roswell*, 6 Conn. 446; *People v. Humphrey*, 7 Johns. 314.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court. Plaintiff in error was convicted in the criminal court of Cook county of the crime of bigamy, upon an indictment charging

that he was lawfully married on June 23, 1892, to Clara E. Squier at Milwaukee, in the State of Wisconsin, and that afterwards, on February 14, 1896, at Columbus, in the State of Ohio, he unlawfully married Annie May Quinnell.

At the trial the second marriage with Annie May Quinnell, and the fact that defendant resided with her as his wife in Cook county, Illinois, from March, 1896, to June, 1897, were conclusively proved and not controverted. The evidence as to the first marriage consisted of testimony that defendant and the alleged first wife lived together as husband and wife in Chicago previous to the second marriage, and while so living together he called her his wife, and said that they had been married in Milwaukee, Wisconsin, and showed what purported to be a marriage certificate. Defendant, claiming that evidence of that kind was insufficient to convict him, asked the court to give the jury the following instruction:

"The jury are instructed that the defendant cannot be convicted of the crime charged where the only evidence of the first marriage charged is proof of cohabitation of the defendant and the alleged first wife as man and wife, and that they had stated that such marriage had taken place."

Where the relation of husband and wife has been assumed the law generally presumes in favor of a lawful marriage; but where it is charged that two successive marriages have taken place the presumption in favor of the legality of each is equal, and an actual marriage must be proved. In this case, the presumption that would ordinarily obtain in favor of the first marriage is met by an equal presumption in favor of the legality of the second marriage, and therefore it was incumbent on the prosecution to show the first marriage to be a marriage in fact. This proof of an actual marriage may be made, however, as of any other fact. Our statute provides that it shall not be necessary to prove either of the marriages by the register or certificate or other record evidence, but the same may be proved by such evidence as is admissible to prove a marriage in other cases. Rev. Stat., sec. 29, ch. 38. In *Jackson v. People*, 2 Scam. 231, it was said that the object of this statute was to let in an inferior grade of evidence, and that it was discretionary with the State's Attorney as to the kind of evidence he would use. It has

been held in some cases that admissions of the defendant of a marriage in fact, though supported by proof of cohabitation and reputation as husband and wife, are not sufficient to prove the fact of marriage, but the great weight of authority is adverse to that position. We can see no reason why an admission or declaration of the defendant of the fact of his marriage should not rest on the same footing as an admission of other facts essential to establish his guilt. There can be no reason for discriminating in such a case, and exempting one fact from the rules of evidence applicable to others. The statement of the defendant may be as conclusive and satisfactory as any other proof of his marriage, and as to that question the jury is to determine. The fact need not be proved by direct evidence, but may be established, like any other fact, by admissions of the defendant. *Miles v. United States*, 103 U. S. 304; *Regina v. Simmonsto*, 1 Car. & Kir. 164; *Wolverton v. State*, 16 Ohio, 173; *Oneale v. Commonwealth*, 17 Gratt. 583; *Williams v. State*, 54 Ala. 131; *Halbrook v. State*, 34 Ark. 511; *Commonwealth v. Jackson*, 11 Bush, 679; *Squire v. State*, 46 Ind. 459; *Dale v. State*, 88 Ga. 552; *Commonwealth v. Hayden*, 163 Mass. 453. In *Tucker v. People*, 117 Ill. 88, the admission of the defendant was deemed competent evidence so far as it went, but it was not sufficient to prove the charge in the indictment, and in *Hiler v. People*, 156 Ill. 511, the evidence was simply of cohabitation and reputation as man and wife, without any admission of a marriage in fact, and it was held that such a marriage had not been proved. It is always held in prosecutions for bigamy, that the marriage cannot be proved by cohabitation and reputation merely, for the reason already given, but it may be proved by the kind of evidence in question here if sufficient to establish the fact, and it was not error to refuse the instruction.

The second wife, Annie May Quinnell, whose marriage with defendant was proved and not controverted, was allowed to testify against the objection of defendant, and gave evidence tending to establish the fact of the first marriage with Clara E. Squier. She testified that defendant told her, after they were married, that he and the alleged first wife went to some town a short distance from Chicago and went through some marriage ceremony. Greenleaf lays down the rule that if the

first marriage is clearly proved and not controverted, then the person with whom the second marriage was had may be admitted as a witness to prove the second marriage, as well as other facts not tending to defeat the first or to legalize the second, but that she ought not to be admitted at all if the first marriage is still a point in controversy. 3 Greenl. on Ev., sec. 206. In *Miles v. United States*, *supra*, it is said that it is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify; that she is never competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all, and that in cases where she can testify she may be a witness to the second marriage, but not to the first. The same rule is laid down in 4 Am. & Eng. Ency. of Law (2d ed.), 47. In this case the only controverted question is the fact of the first marriage, and the court clearly erred in allowing Annie May Quinnell to testify as a witness. For this error the judgment must be reversed.

The judgment is accordingly reversed and the cause remanded. Reversed and remanded.

NOTES (by H. C. G.).—An important question is here suggested: Can the second wife of defendant on trial for bigamy testify under any circumstances?

As matter of principle and legal logic, it would seem that neither wife can testify. It is clear that established law and public policy excludes the first wife, who is usually designated as the lawful wife. Defendant is charged with marrying a second wife while having a living lawful wife. But the plea of not guilty puts the allegations of a second marriage, and all other material allegations, in issue, and puts the burden of proving them all, beyond reasonable doubt, upon the prosecution. Defendant is presumed to be innocent through every stage of the trial, until the case is finally submitted to the jury to determine from all of the evidence whether that presumption has been overcome. Until the jury thus acts, is it not a legal presumption that defendant *did not contract* a bigamous marriage, and that the second wife is a lawful wife? And this, notwithstanding defendant's failure to controvert any evidence received, and independent of any supposed admissions that may have been received in evidence.

The law does not require him to deny or controvert any evidence or admissions that may have been received touching the first marriage or any other matter; and the receiving of such evidence while the presumption of innocence continues is not an adjudication or establishment of any fact against him whatsoever. Until the jury adjudicates

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the question the presumption is that the second wife is a legal wife. How, then, can she be permitted to testify?

As to the husband and wife giving evidence in criminal cases, the rule at common law seems to have been well settled that neither could give evidence against the other except for a personal injury by the one to the other, or in proceedings to keep the peace; and it has been held that such injury must have been of a serious nature to permit of such evidence. The weightiest consideration in maintaining this rule was that of *public policy*, which is apparent on an inspection of the leading authorities, some of which are the following:

In 2 Kent's Com., p. 179, the principle is stated thus: "The husband and wife cannot be witnesses for or against each other in a civil suit. This is a settled principle of law and equity, and it is founded as well on the interest of the parties being the same as on public policy. The foundations of society would be shaken, according to the strong language of some of the cases, by permitting it. Nor can either of them be permitted to give any testimony, either in a civil or criminal case, which goes to *criminate the other*; and this rule is so inviolable that *no consent* will authorize the breach of it."

In Buller's Nisi Prius, p. 286, it is said: "That husband and wife cannot be admitted to be witnesses for each other, because their interests are absolutely the same; nor against each other, because contrary to the legal policy of marriage." Further along he refers to the case of a woman compelled by force to marry, as an exception,—"For a contract obtained by force has no obligation in law. So upon an indictment . . . for marrying a second wife, the first being alive, though the first cannot be a witness, the second may, the second marriage being void."

In a case for malicious prosecution, Lord Hardwicke, C. J., said: "The reason the law will not suffer a wife to be a witness for or against her husband is, to preserve the peace of families; and therefore I shall never encourage such a consent." Cases temp. Hardwicke, 264.

In *Wilson v. Hill*, 13 N. J. Eq. 143 (on p. 147), the case being one upon equitable interests in property and growing out of transactions connected with an attempted indictment for bigamy, the court said: "The wife was most unlawfully and improperly brought before the grand jury, and compelled to testify upon a criminal charge against her husband. There is no clearer principle of law than that a wife will not be permitted to testify against her husband on a charge of bigamy, even by the husband's consent. 2 Starkie's Ev. 399; *Gregg's Case*, Sir T. Raymond, 1; Roscoe's Crim. Ev. 114. She is not permitted to testify for or against him—not for him, on account of the strong influence and temptation she is under to pervert the truth in his favor; nor against him, for fear of creating dissension. The evidence is excluded, and, in my judgment, most wisely excluded, upon principles of public policy."

In *Mitchinson v. Cross*, 58 Ill. 336, in referring to 2 Kent's Com. 179, *supra*, the court said: "This reference is not made so much to show what the rule was, as the foundation of the rule, which is both on the ground of interest and public policy." . . . "It is apparent that

this provision of the statute removes the disqualification of witnesses by reason of interest. But does it touch a disqualification based upon reasons of public policy? We think not. The question has arisen in England and in several of the States, under statutes similar to ours, and it has been uniformly held that a statute removing incompetency, by reason of interest, did not remove it as to husband or wife." And the same court, in *Reeves, Jr. v. Herr*, 59 Ill. 79, in referring to the exclusion of such evidence based on the ground of unity of interest, said: "But we conceive this rule of exclusion does not rest solely upon that ground, but on considerations of public policy as well." And the court refers to Coke on Littleton as laying down the doctrine that a wife cannot be produced for or against her husband because it might be a cause of implacable discord and dissension between them and a means of great inconvenience.

In *Miner v. The People*, 58 Ill. 59, which was an indictment for adultery against Miner and Eliza Jones, and on the trial of which Samuel Jones, her alleged husband, had been permitted to testify, the court said he was an incompetent witness; and that "It may be assumed as an inflexible rule that, where husband or wife is a party, neither can be a witness, either for or against each other, except as modified by the statute. This is not changed by the act of 1867."

"This provision only removes the disqualification of witnesses by reason of interest or conviction of crime. The exclusion of husband and wife from being witnesses for or against each other is not solely on the ground of interest. This exclusion is partly founded on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society." 1 Greenl. Ev., sec. 334; Roscoe's Crim. Ev. 147 (5th ed.). Under a similar statute removing the incompetency of witnesses by reason of interest, in civil cases, this court held that the statute did not reach a disqualification based upon reasons of public policy, and so did not remove the incompetency as to husband and wife. *Mitchinson v. Cross*, 58 Ill. 366." From *Creed v. People*, 81 Ill. 565.

Mr. Greenleaf (sec. 334, vol. 1), after stating the common-law general rule to be, that neither could give evidence in a civil or criminal case to which the other was a party, proceeded: "This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence."

2 Starkie's Ev. 706 (Metcalf's 3d Am. ed., 1830), lays down the rule: "The husband and wife cannot be witnesses for each other, for their interests are identical, nor against each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury. So important is this rule that the law will not allow it to be violated, even by agreement; the wife cannot be examined against the husband, although he consents; and the principle

is further preserved by adhering to the rule even after the marriage tie has been dissolved by the death of one of the parties, or by a divorce for adultery."

In Roscoe's Cr. Ev. 125, referring to the statutes on evidence, it is said: "An important exception, however, was expressly made in criminal cases with regard to husbands and wives, who remain as at common law, incompetent witnesses either *for or against* each other." . . . "The rule is in general absolute, and cannot be waived. It excludes them from giving evidence, not only of facts, but of statements made by either in the nature of admissions."

This rule was ably discussed in North Carolina, and in *State v. Hussey*, 44 N. C. 123, after alluding to the rule as established, the court said: "This rule has been adopted partly on the ground of interest and partly on principles of public policy, which lie at the basis of civil society. A contrary rule would break down or weaken the great principles which protect the sanctities of the marriage state. The confidence existing between husband and wife should be treasured and rendered inviolate."

In *Overton v. State*, 43 Tex. 616, which was an indictment against Overton for appropriating a mule claimed by the wife to have been her special property, the Supreme Court said that the wife was an incompetent witness; that the evident intent and purpose of the law in permitting an exception to the rule where personal offenses against each other were to be inquired into did not mean injuries to property, but strictly *personal offenses* by the one against the other.

In *State v. Welch*, 26 Me. 30, the court said: "The defendant is indicted for the crime of adultery, and the question is, whether the husband of the woman with whom it is alleged to have been committed is a competent witness to testify to the act. Neither the husband nor wife of the party is competent to give evidence against such party. The reason for the exclusion is founded partly on the identity of interest and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice."

COMMONWEALTH v. MILLIKEN.

174 Mass. 79—54 N. E. Rep. 357.

Decided July 1, 1899.

BRIBERY: Indictment—Allegations—Construction.

1. Where a juror was indicted under the statute for receiving a bribe, it was unnecessary to allege that the bribe was given by a party to the action.
2. Where the indictment follows the words of the statute it is sufficient.

Charles H. Milliken was convicted of taking a bribe, in the Superior Criminal Court; Gaskill, Judge; and takes exceptions. Exceptions overruled.

J. D. McLaughlin, Second Asst. Dist. Attorney, for the Commonwealth.

H. W. James, for the defendant.

MORTON, J. The exceptions in this case are to the overruling of the motion to quash. The first, second, and fourth reasons contained in the motion are that the indictment does not allege that the bribe was taken or received from a party to the action or from one acting on behalf of such a party. It was not necessary that it should so allege. The statute under which the defendant was indicted provides that if a juror "corruptly takes anything to give his verdict," or "corruptly receives any gift or gratuity whatever from a party to a suit, cause, or proceeding . . . he shall be punished," etc. Pub. Stats., ch. 205, § 15. There are therefore two things for either of which a juror may be indicted; namely, corruptly taking anything to give his verdict, or corruptly receiving any gift from a party to a suit, cause, or proceeding. The defendant was indicted for doing the first, and it was unnecessary to allege that the bribe was taken or received from a party to the cause or proceeding. What we have said disposes of the third reason also, which is that two distinct offenses are set forth in one count. The fifth reason is that the agreement under which the money was received is not sufficiently described. The indictment follows the words of the statute. *Commonwealth v. Dyer*, 128 Mass. 70. It is enough to allege of the defendant that he corruptly took money of a person to the jurors unknown, to give his verdict in favor of one of the parties to the cause. Ordinarily it would be impossible to describe the agreement under which the money was received, and the statute does not require it. The statute sets forth with clearness the things which constitute the offense, and it is not necessary to include any others in the indictment. The sixth reason, that the indictment did not plainly, substantially, and formally set forth any offense against the laws of this Commonwealth, has not been argued. There is clearly no merit in it. Exceptions overruled.

STATE V. DURNAM.

73 Minn. 150—75 N. W. Rep. 1127.

Decided July 1, 1898.

BRIBERY: Challenge to panel—Challenges to jurors—Incompetency of jurors—Indictment—Evidence—Accomplice—Punishment.

1. Challenges to the panel not allowed. Loose practice thereon.
2. General challenge to jurors for "actual bias" is sufficient, especially where the defendant joined issue on the challenges without objecting to their insufficiency.
3. Where the court acted as the trier on such challenges, its findings are not reviewable.
4. Objections cannot be taken to competency of jurors after sworn. The fact that a juror who had declared his intention to become a citizen, but was not a citizen of the United States, but who had not been asked as to his citizenship on his examination, sat on the trial, should not be ground for disturbing the verdict. Such disqualification does not go to the intelligence or impartiality of a juror.
5. A defendant in a criminal case may waive an objection to a juror for incompetency.
6. Defendant was indicted for asking a bribe from Richards, "*upon the understanding and agreement*"—statutory words—that his vote, etc., should be influenced in favor of accepting a certain bid by Halvorson, Richards & Co., *held* unnecessary to allege with whom the understanding and agreement was made; that where one asks for a bribe, it is not necessary that the one asked should consent to give it. It suffices that the party asking for a bribe is ready and willing to accept it.
7. The city council's proceedings, including the committee's majority and minority reports, and the bids, were competent evidence.
8. Evidence of a conversation defendant had with Halvorson on the day previous to the transaction with Richards not improper as relating to a separate offense. The several conversations were parts of the same transaction. Even if it related to a separate offense, it would have been admissible for the purpose of showing criminal intent, as attempting similar offenses.
9. Instructions that it was immaterial whether or not defendant's own vote was to be affected by the bribe, if he was to corruptly influence the action of other members of the council, he would be guilty, *held* not erroneous.
10. Instructions implying that the persons solicited for bribes were accomplices, properly refused.
11. Sentence of six years and six months not excessive, and not "cruel or unusual" punishment.

Appeal from Hennepin County District Court; Elliott, Judge.

George A. Durnam convicted of soliciting a bribe. Affirmed.

H. W. Childs, Attorney-General, and *James A. Peterson*, County Attorney for Hennepin County, for the State.
Harrison & Noyes, for the appellant.

The facts appear in the opinion.

MITCHELL, J. The defendant was indicted under section 65 of the Penal Code (G. S. 1894, § 6349) for having asked for a bribe from one Charles H. Richards, as a member of the firm of Halvorson, Richards & Co., "Upon the understanding and agreement that his, the said George H. Durnam's, official vote and action as a member of said city council (of Minneapolis), as aforesaid, should be influenced thereby in the following manner, to wit, in favor of the acceptance by the city council of a certain bid theretofore duly submitted and proposed by the said Halvorson, Richards & Company to said city council for the construction of a reservoir and boulevard by the said city of Minneapolis," etc.

The trial resulted in a conviction, and from an order denying his motion for a new trial the defendant appealed.

1. The first five assignments of error relate to the action of the court in reference to the defendant's challenges to the panel of petit jurors. The record shows that when the case was called for trial the following proceedings were had, viz:

"Defendant's counsel: I have a challenge here to the panel, and the same challenge to the special venire called for last Monday of fifty names. The court: You do not care to argue that now? Defendant's counsel: No, sir. The court: Challenge found not true. Defendant's counsel: Defendant excepts."

The challenges so made and filed with the clerk were on the ground that the list of petit jurors and the special venire were not selected as provided by G. S. 1894, § 5611. This is absolutely all that the record discloses on the subject. In his certificate to the bill of exceptions the trial judge states as follows:

"The challenges to the panels were made and fully argued at a former trial of a similar case, and decided by another judge of this court. When the questions were raised on this trial, it was stated that no argument would be made on the same. The challenges were made and ruled on by the court with the under-

standing that they were denied, and that a record simply was being made."

Defendant's counsel do not deny the truth of any part of this statement except that which alleges that the challenges to the panels were fully argued at a former trial of a similar case, their claim being that, although made, denied by the State, and evidence introduced, the challenges were not argued at all.

The course of procedure where a challenge to the panel is interposed is prescribed by G. S. 1894, §§ 7356-7359. When this challenge was interposed, counsel for the State should have excepted to it, or denied it, or first excepted, and, if that was disallowed, then denied the facts alleged in the challenge, and the court should then have proceeded to try the question of fact. According to the record, as soon as the counsel interposed the challenge, and before counsel for the State had either excepted to it or denied it, the court, on its own motion, took for granted, as indicated by his question, that counsel for the defendant, for some reason, would not care to argue the matter, to which counsel promptly assented. This clearly indicates that the record is incomplete, and that both court and counsel were acting upon something which had preceded, and which was understood between themselves, but which does not appear in the record.

The place for facts to appear is in the "case" or bill of exceptions, and not in the judge's certificate; and the general rule is that the court cannot cure a ruling which is erroneous according to the former by attempting to state additional facts or explanations in the latter. But in this case the statements contained in the certificate so dovetail in with the evidently incomplete record, and throw so much light upon it, that, read in that light, the record is perfectly intelligible, and makes clear that the understanding of both court and counsel was that, as this challenge was made upon the same grounds as the challenge in a former similar case, and the evidence in support of it would be the same, it should be considered denied, and overruled *pro forma*, so that defendant might save the question in case of an appeal. Counsel's answer was certainly calculated to convey this impression.

He suggests that, as the challenge had been neither excepted to nor denied by the State, there was nothing for them to argue,

and that it was not his duty to advise the counsel for the State or the court as to the proper procedure. But no court would have understood counsel's answer as meaning what he now claims, viz., that he did not wish to argue the question because there was nothing before the court to argue. On the contrary, it would, under the circumstances, understand counsel as meaning just what the court says it did, and as we have no doubt he did mean, viz., that, in view of the former rulings of the court on the question, he expected an adverse decision, but wished to save it on the record for the purpose of an appeal.

A very loose and informal practice was adopted both on the trial and in making up the bill of exceptions, but we think that it is clearly apparent that the meaning of both counsel and court was as stated above.

2. There are several assignments of error relating to challenges to individual jurors. The State challenged certain jurors on the ground of "actual bias." It is urged that this is not sufficiently specific; that G. S. 1894, § 7372, requires that in a challenge for actual bias the cause stated in the second subdivision of section 7368 shall be alleged. No such practice has ever obtained in this State, so far as we know. We are satisfied that the general understanding of the courts and bar is that a challenge generally "for actual bias" is sufficient in form, and that section 7372 does not mean that the challenge shall recite the second subdivision of section 7368, but merely refers to the latter for a definition of actual bias.

But it is unnecessary to pass on this question, because defendant made no objection to the sufficiency of the challenges, but joined issue by denying them, and then proceeded with the trial of them on the evidence.

There is nothing in the point that the court erred in finding these challenges true. The decision of triors is not reviewable, and the same is true of the decision of the court when it acts in place of triors. *State v. Mims*, 26 Minn. 183, 2 N. W. Rep. 294, 683.

3. It is urged that the indictment is insufficient for the reason that it does not state with whom the "understanding and agreement" were made that defendant's official vote and action should be influenced thereby, or that any understanding and

agreement to that effect were made with any person. This contention is based entirely upon the use in the statute of the words "upon any agreement or understanding." It is argued that these words necessarily imply the meeting of two minds, and hence, to constitute an offense under this statute, the minds of the officer asking the bribe and of the person from whom it is asked shall meet upon the proposition that the officer will violate his official duty.

If this contention is sound, it would necessarily follow that no public officer would be guilty of the offense of asking for a bribe unless he found a person who could and did corruptly agree to pay it. There is no middle ground. The inevitable logic of counsel's position is that there can be no conviction of an officer for asking a bribe unless facts can be shown which constitute a crime on the part of the one from whom the bribe was asked. Such a construction would practically nullify the statute altogether, for, if the person of whom the bribe was solicited proved to be honest, and refused to entertain the proposition, the officer soliciting the bribe would be guilty of no offense, while, on the other hand, if he was dishonest, and agreed to pay the bribe, he would not be likely to inform on the officer, and by so doing incriminate himself.

This is not the correct construction of the statute. The meaning to be given to the words "agreement" and "understanding" depends upon the connection in which they are used; and in construing a statute it is a very unsafe practice to adhere strictly to lexicographers' definitions of words standing alone, and severed from their context. To constitute the offense under this statute of asking for a bribe, it is not necessary that the party solicited shall consent to give it. All that is necessary is that the party asking the bribe is ready and willing to enter into a corrupt agreement or understanding to accept it. *People v. Squires*, 99 Cal. 327, 33 Pac. Rep. 1092. See also *Com. v. Murray*, 135 Mass. 530.

4. This brings us to the consideration of the assignment of error relating to the conduct and qualifications of certain members of the jury which tried the case.

One Armitage was called as a juror, and was examined by defendant's counsel as to his residence, business, and whether he

had any acquaintance or business relations with counsel for the State. Counsel, without pursuing the examination any further, or interposing a challenge, expressed himself as content with the juror. Counsel for the State, after inquiring briefly of the juror as to his acquaintance or business relations with the defendant or the other members of the city council, also expressed himself as content, and Armitage was then sworn as a juror, without objection by either party. After verdict, and on motion for a new trial, the defendant presented affidavits tending to show that Armitage was not a qualified juror, not being a citizen of the United States; also that prior to this trial, and immediately after the disagreement of the jury on a former trial of the case, he stated that he wished he had been on that jury; that he would have done all he could to convict the defendant; also that after the rendition of the verdict on the last trial he stated that he "was glad to get a chance to sit on the jury; that he knew defendant pretty well,"—implying that he was glad to have a chance to convict him. Armitage made an affidavit, in which he positively denies having made either of these statements, in which he was corroborated by the affidavits of several persons who were present on the occasion on which the statements were alleged to have been made.

Upon these conflicting affidavits it was for the trial judge to determine on which side the truth was.

However, it stood practically admitted that at the time of the trial Armitage was not a citizen of the United States, but had merely declared his intention of becoming such.

The doctrine is as old as the common law that no objection could be taken to any incompetency of a juror after he was accepted and sworn. *Wharton's Case*, Yelv. 24. While this doctrine may have been somewhat modified in modern times, yet the general rule (and the better one on principle) still is: First, no objection can be taken to any incompetency in a juror (existing at the time he was called) after he is accepted and sworn, if the fact was known to the party, and he was silent; second, and, even if not discovered until after verdict, the cause of challenge will not *per se* constitute ground for a new trial. In such case only the discretion of the court can be appealed to, which will consider the nature of the objection to the juror, what diligence

the party exercised to ascertain the fact in due time, and the other circumstances of the case. 1 Bishop, Cr. Proc., §§ 946, 949a; *State v. Davis*, 80 N. C. 412; *George v. State*, 39 Miss. 570; *Beck v. State*, 20 Ohio St. 228; *Gillespie v. State*, 8 Yerg. 507; *State v. Quarrel*, 2 Bay, 150; *State v. Jackson*, 27 Kan. 581; *Chase v. People*, 40 Ill. 352; *State v. Vogel*, 22 Wis. 440.

Some of the cases seem to hold that under no circumstances, even where the objection was not discovered until after verdict, will the incompetency of the juror be ground for a new trial. We would not go that far. We think it is a matter addressed to the sound judicial discretion of the trial judge, who should take all the circumstances above referred to into consideration.

In this case, although the court permitted defendant's counsel to examine the juror preliminarily, in order to determine whether he would interpose a challenge, yet counsel never made any inquiry as to the citizenship of the juror, but accepted him without interposing any challenge; and that, too, at a time when, owing to the recent amendment of our constitution, the question of citizenship was frequently called to the attention of the courts and the bar, in order to ascertain the qualification of both grand and petit jurors. The disqualification by reason of alienage is one which does not go to either the intelligence or the impartiality of a proposed juror. In view of the nature of the objection and the lack of diligence to ascertain the juror's competency, we are clearly of opinion that the trial court committed no error in denying a new trial on the ground now under consideration.

There is a very clear distinction between waiving a trial by jury and waiving an objection to the competency of a juror. A defendant indicted for a felony can waive the latter, although it may not be competent for him to waive the former. This doctrine does not at all infringe upon the constitutional guaranty that the right of trial by jury shall remain inviolate. See *Kohl v. Lehlback*, 160 U. S. 293, 16 Sup. Ct. 304.

What has been said as to the statement alleged to have been made by the juror Armitage tending to show actual bias on his part is equally applicable to similar statements alleged to have been made by the jurors Washburn and Campbell. Defendant's counsel merely asked them the same general questions as

to their residence, business and personal relations with the counsel for the State, and then accepted them without interposing any challenge. The affidavits submitted by the defendant were sufficiently rebutted by counter affidavits on part of the State to make the question one of fact for the trial court, who, under the circumstances, occupies a position somewhat analogous to that of the trier before trial.

We find nothing substantial in the charges of misconduct of the jurors while deliberating on their verdict. The affidavits of jurors as to what took place in the jury room were inadmissible for the purpose of impeaching their verdict. The claim that they were allowed to separate during their deliberation was sufficiently rebutted or explained by the affidavits of the jurors themselves and of the deputy sheriff who had them in charge.

5. Next in order are the assignments of error relating to the admission of evidence.

The proceedings before the city council, including the reports of the committee, both majority and minority, and the bid of Halvorson, Richards & Co., were competent for the purpose of showing that the matter upon which the bribe was alleged to have been solicited, to wit, the construction of a reservoir and boulevard, was pending before the city council, and in what way or manner it came to be pending. These proceedings showed that the matter pending before the council was not merely whether a reservoir and boulevard should be constructed, but also, and perhaps mainly, whether the work should be let by contract or done by the city itself by day labor, and that Halvorson, Richards & Co. was a bidder, and the lowest bidder, for the contract.

The mere fact that the report of the minority of the committee contained some arguments in favor of doing the work by contract, which counsel for the State might attempt to use against the defendant in an illegitimate way, would not render the evidence incompetent. It would be for the court to instruct the jury for what purposes alone they might consider it.

Conceding, without deciding, that the other bids for the work were immaterial, it is impossible to conceive how the defendant could have been prejudiced by their admission.

The evidence of the State was to the effect that on May 2, Halvorson, the senior partner of the firm of Halvorson, Richards & Co., had a conversation with the defendant in regard to the construction of the proposed reservoir and boulevard, in which defendant stated to him that "there was one way to get that work," and, on being asked what it was, replied, "If you put up \$10,000, you can get it," and that after some further conversation on the subject Halvorson said to defendant that he would see his partner, to which defendant replied, "If you will, you had better meet me at the Nicollet House at eight o'clock to-night;" that Halvorson went to the Nicollet House that evening, and found his partner Richards there, and told him what defendant had said, and then introduced him to the defendant; that defendant and Richards had no conversation on the subject that night, but that the next morning Richards met defendant at the city hall, and then and there had a conversation with him, which was opened by Richards saying to him that they had concluded that they could not afford to pay any money for the contract; that he did not think they could afford to pay \$10,000 for the contract. This conversation continued, in the course of which, according to the State's evidence, defendant asked Richards for a bribe, which alleged asking constituted the crime charged in the indictment.

Counsel assign as error the admission of the conversation between the defendant and Halvorson on May 2, on the ground that it tended to prove the commission of a distinct and separate crime, to wit, asking Halvorson for a bribe. We do not see why this evidence was not admissible under the rule which, in certain cases, permits evidence of other similar offenses for the purpose of proving criminal intent. See *State v. Wilson*, 72 Minn. 522, 75 N. W. Rep. 715.

But it is not necessary to resort to this rule in order to sustain the admission of this evidence. The conversation between defendant and Halvorson on May 2, and that between defendant and Richards on May 3, were parts of the same transaction. The latter was but a continuation of the former. The former was admissible for the purpose, if no other, of explaining and illustrating the latter. The court carefully explained

to the jury the purpose of the evidence, and instructed them that it could not be made the basis of a conviction of the defendant for asking a bribe from Halvorson; that, under the indictment, he could only be convicted of asking a bribe from Richards, as charged.

6. There are numerous assignments of error as to portions of the court's charge and its refusal to charge as requested. Many of these are based upon the erroneous assumption that to constitute the crime charged there must be a meeting of minds, or a mutual understanding or agreement, between the person asking the bribe and the person of whom it is asked. This has been already fully discussed in considering the sufficiency of the indictment.

The court charged the jury that it was immaterial whether defendant's own vote was to be affected by the bribe or not; if he asked for the money, intending and understanding that he would take the money, and use it for the purpose of influencing the action of other members of the council, and corruptly obtaining the contract for these people (Halvorson, Richards & Co.), then he would be guilty of the crime charged in the indictment.

The crime, as defined by the statute (G. S. 1894, § 6349), is "Asking," etc., "upon any agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding or in any way neglect or violate any official duty."

The indictment charges that defendant asked the bribe "Upon the understanding and agreement that his . . . vote and official action . . . should be influenced thereby."

We are of opinion that both the statute and the indictment are broad enough to include the case of a member of an official body asking for money or other valuable things for the purpose of thereby corruptly bribing or influencing the votes of his colleagues. An alderman's constituents are entitled to his influence with his colleagues in the city council as much as they are to his vote. The one is as much within the sphere of his official action as is the other. The statute never intended that a public officer could, for a consideration, corruptly use his influence in bribing his colleagues to vote for or against a measure, and yet

be exempt from criminal prosecution, provided his own vote was not to be influenced thereby.

Counsel is in error in claiming that there was no evidence to which this instruction was applicable. Richards testified that defendant stated—

“That, as far as he was concerned, he would be willing for us to have the contract without putting up anything, but that there were sixteen of them in the company, in the crowd, and that they had agreed that there shouldn’t one of them accept money unless they all had some.”

The court refused to give to the jury certain requested instructions upon the proposition that a conviction cannot be had upon the uncorroborated testimony of an accomplice. These requests were made upon the theory that Richards, or both Richards and Halvorson, were accomplices of the defendant in the commission of the offense charged, or at least that there was evidence tending to prove that fact. If there is any evidence tending to implicate Halvorson or Richards, even morally, with the crime charged, the most that can possibly be claimed for it is that it tended to prove that they were inclined to entertain defendant’s demand favorably, and would have been willing to accede to it if the sum demanded had not been so large.

Even if they had fully acceded to defendant’s demand, and had paid or offered to pay the sum demanded, although they would have been guilty of an independent and separate crime, they would not have been, within the meaning of the law, accomplices of the defendant in the commission of the crime of asking for a bribe. An accomplice, in legal signification, is one who co-operates, aids or assists another in the commission of a crime, either as principal or accessory. The general test to determine whether a witness is or is not an accomplice is, could he himself have been indicted for the offense either as principal or as accessory? If he could not, then he is not an accomplice. *Com. v. Wood*, 11 Gray, 85. Each of the two parties to a transaction may be guilty of a crime, and yet, if the two crimes are separate and distinct crimes, the one is not the accomplice of the other. Thus, suppose A. asks B. for a bribe, and B. pays it. A. is guilty of the crime of asking a bribe, and B. of the crime of giving one. But the two crimes are entirely distinct, and

neither party could be indicted, either as principal or accessory, for the crime committed by the other. Such a case would not be within the statute forbidding a conviction on the uncorroborated evidence of an accomplice, although, of course, the moral delinquency of either, if called as a witness against the other, would be a fact going to his credibility, which a jury should take into consideration. *State v. Sargent*, 71 Minn. 28, 73 N. W. Rep. 626. See also *Regina v. Boyes*, 1 Best & S. 311.

7. It is further claimed that the evidence is insufficient to support the verdict. We have, to the best of our ability, given the record the careful examination which the importance and gravity of the case demanded, keeping in mind that it is a criminal, and not a civil, action. As might be expected, the direct evidence was confined to the testimony of Halvorson and Richards on the one side and of the defendant on the other. It would be worse than useless—in fact, misleading—to enter upon a discussion of the evidence, unless it was done exhaustively; and this could not be done within any reasonable limits. Therefore we will not attempt it. Our conclusion is that it justified the verdict, which was evidently the view of the trial judge who saw and heard the witnesses on the stand.

8. The "newly discovered evidence" of Warner was merely cumulative, and tending to contradict the testimony of Halvorson in some particulars, and generally was not of such a character as to require the trial court, in the exercise of a sound judicial discretion, to grant a new trial, even conceding that it would have justified it in doing so.

9. The maximum punishment, under the statute, for this crime is imprisonment in the State's prison for ten years. The sentence of the court was that the defendant be confined in the penitentiary for six years and six months. It is urged that this sentence is "excessive, unjust and contrary to the spirit and intent of the law." The sentence is severe, but the crime is grave, and one which tends, probably more than any other, to sap the very foundation of all civil government. It is for the legislature, and not for the courts, to determine what the punishment for crime shall be, provided it is neither cruel nor unusual.

The assignments of error are very numerous, but what has been said covers all points of any substance urged by counsel.

We find no error in the record, and the order denying a new trial is affirmed.

NOTE.—*Offering to bribe a United States Chinese interpreter.*—Yee Gee, a Chinaman, was held on a charge of offering to bribe an interpreter, and appointee of the secretary of the United States Treasury, whose duty it was to make Chinese translations for the use of that department; the interpreter being about to translate certain Chinese letters and documents for a United States commissioner, on a charge against Yee Gee, to be heard by the commissioner. It was held that there was no offense under the statute providing for a penalty for offering to bribe any officer or appointee of the United States, or any department or office of the government, etc. That when the interpreter acted as such for the commissioner, it was out of the scope of his duty as an appointee of the Treasury department; and that whatever he might do in such matters was in no sense connected with the duties of his office as an appointee of the Treasury department, and as to such outside services, he was not an officer or appointee of the United States. *Re Yee Gee*, 83 Fed. Rep. 145.

In *Com. v. Donovan et al.*, 170 Mass. 228, 49 N. E. Rep. 104, it appeared that certain municipal officers, including Donovan, as treasurer, were appointed by a Democratic mayor, under the statute; but the law being changed so as to restore the power of appointments to the council, which by a two-thirds vote could remove the mayor's appointees, and the council being two-thirds Republican, and it being understood that they would oust the mayor's appointees, friends of Donovan went to a councilman to prevail upon him to help retain Donovan. At the conclusion of the interview he asked what there was in it for him, to which they said they did not know, but arranged for Donovan to see him. At a subsequent meeting, he having persons concealed, after talking the matter over, he again suggested a bribe, saying it would take money to buy him. Finally it was agreed that he would take promissory notes to the amount of \$250. The principal declared he never signed the notes; that they were forgeries. Donovan, his brother and another were convicted, and conviction affirmed; but it seems the very important question of entrapment and collusion in crime was not in any way considered. According to many authorities, that was a weighty question; and if the circumstances suggested a plot for political or other sinister purposes to draw defendant into a trap, the suggestions coming from the prosecutors, the defendant might be exonerated, because the law ought not to encourage conspiracies to seduce and entrap men into committing offenses which they might otherwise not have committed. It would seem that one of the gravest questions in the case was entirely ignored. (1898.)

DRAUGHN V. STATE.

76 Miss. 574—25 So. Rep. 153.

Decided March 6, 1899.

BURGLARY: *Indictment—Variance—Confessions.*

1. An indictment should charge the breaking into a house with intent to steal the goods of the owner.
2. Proof of breaking, etc., into a smoke-house does not sustain an allegation of breaking into a dwelling-house.
3. The court should inquire as to whether a confession is free and voluntary before admitting it in evidence.
4. Flattery of hope, by promise not to prosecute, vitiates a confession.

Appeal from the Circuit Court of Perry County; Hon. A. G. Mayers, Judge.

William Draughn, being convicted of burglary, appeals. Reversed.

Hartfield & McLaurin, McWillie & Thompson, and M. U. Mounger, for the appellant.

The Attorney-General, for the State.

TERRAL, J. The indictment alleged "that William Draughn on the — day of June, 1895, did feloniously and burglariously break and enter the dwelling-house of Sam West, with intent to commit the crime of larceny therein," etc. In the course of the trial it clearly appeared from the evidence of the prosecutor, Sam West, that the house broken into was not a dwelling-house, but was a crib, and the only evidence of its use was that of West, who said that he lost some bacon out of it. The variance between the allegation of the breaking into a dwelling-house and the evidence relating thereto constitutes the first objection of the defendant to his conviction. The evidence arising from the confession of Draughn, obtained by a promise not to prosecute him, was also objected to. In the third place the defendant complains that, before West testified as to the confessions of Draughn, he requested the court to ascertain, apart from the jury, whether the forthcoming confession was free and voluntary, or not, which the court declined to do; and this action is also complained of. These several objections, we think, are well taken.

1. That the court, before admitting the confession to the jury, should have examined, and known that it was free and voluntary, is held by *Ellis v. State*, 65 Miss. 47, 3 So. Rep. 188.

2. That the flattery of hope, held out to the defendant by the promise of West not to prosecute him, vitiated the confession as evidence, is announced in 1 Greenl. Ev., § 219.

3. That the breaking of a crib or of a smoke-house will not support the allegation of the breaking of a dwelling-house is affirmed by Whart. Am. Cr. Law (6th ed.), § 1611.

The indictment is bad in not alleging that Draughn broke and entered the house of West, with intent the goods and chattels of West, then in said house, feloniously and burglariously to take and carry away. Whart. Ind. (2d ed.), § 367, p. 248.

The judgment is reversed, the verdict is set aside, the indictment is quashed, and the defendant is held to answer such bill as may be found against him. Reversed and remanded.

NOTE (by H. C. G.)—*Double conviction for burglary and larceny; distinctions and errors.*—Under the statute, burglary, and larceny connected with the burglary, could be charged in the same indictment or count; and if a conviction were had for burglary, the party might also be convicted of the larceny, and for such *burglarious* larceny the penalty was not less than two nor more than five years. Where the court failed to instruct the jury as to what should be done in case they should convict of one offense only, it was held to be error; for if the jury should acquit of the burglary and convict of larceny, then the larceny would be under the general statute, and would be either grand or petit larceny, and should be punished accordingly. In the case considered, the value of the property would have made it petit larceny, and the jury should have been instructed as to cover such contingencies. *State v. Brinckley*, 146 Mo. 37, 47 S. W. Rep. 793 (1898).

ROBERTS v. TERRITORY.

8 Okl. 326—57 Pac. Rep. 840.

Decided June 15, 1899.

BURGLARY: *Entrapment—Collusion and connivance of owner—Decoy.*

Appellant, seventeen years of age, along with his brother and quondam bartender of the owner, went to a saloon one night, and appellant was convicted of burglary. It appeared from the evidence

of the owner that he had some arrangement with the bartender by which he was to come with the boys. And it appeared from appellant's evidence that he and his brother were induced to go to the saloon by the representations of the bartender, that it would be all right, and that a window was left open for them, and that they could get some whiskey. *Held*, that the inducement and consent of the agent of the owner was the inducement and consent of the owner; that there was no burglary, and that the methods used to entrap appellant were reprehensible.

Error to the Custer County District Court; J. C. Tarsney, Judge. Conviction for burglary. Reversed.

H. S. Cunningham, Atty. Gen., *J. T. Shive*, Co. Atty., and *Roy Hoffman*, for the Territory.

Grigsby & Pearl and *W. A. Maurer*, for the plaintiff in error.

MCATEE, J. One of the grounds stated in the motion for a new trial was that the court had committed error upon the trial of the cause, and that the verdict of the jury was contrary to the law and the evidence. The action of the court here complained of was upon a demurrer to the testimony introduced by the prosecution upon the ground that it did not prove the guilt of the defendant, and because the witness, Ben Bullard, who owns the building, and the goods in the building, charged in the indictment, had made and entered into an agreement with one Dick Shriver to bring the defendant there and go into the saloon, and that Bullard could not make a break into his own building, and that, if he gave Shriver authority to do so, there was no breaking in.

It appeared from the testimony on the part of the prosecution that Bullard was the occupant of the saloon building in which the burglary was charged to have been committed; that he was informed by one Dick Shriver that the defendant, Roberts, and his brother, Bert Roberts, were going to break in there, and that Shriver told Bullard about it, and that Bullard told Shriver to find out if he could, what night it was, and, when he had found out, to let him (Bullard) know; that afterwards Shriver informed Bullard that "to-morrow night the boys were coming to break in, and I am going with them;" and that finally Bullard told him that it would be "all right." It appeared from the cross-examination of Bullard that Shriver had at times kept bar

for him in the saloon, and under cross-examination he testified as follows:

"Question. And you told Shriver it would be all right for him to bring them (the Roberts boys), and go into the house? Answer. Not at that time. Not at the first time.

"Q. Did you tell him that at any time before the breaking? A. He said they would break in whether he came or not.

"Q. And then you told him that it would be all right if he went along with them and broke in? A. No, sir; I only told him that it would be all right."

The defendant testified: That at the time of the alleged breaking he was seventeen years of age. That he had known Dick Shriver for about a year and a half, and that he (Shriver) had kept bar for Bullard "off and on." That on the night of the alleged breaking "he left there to go to the dance, and intended to go around by our father's place, so that my brother could change his clothes; and we got on our horses, and Dick says, 'We haven't got enough whisky; we will go and get some;' and he says, 'The window is left open for my benefit;' and we says to him, 'If there is no danger, we'll go,' and he says, 'Well, just walk up there;' and we started to go to the back entrance, and the window was raised two or three inches. There was no prizing or anything of that kind at all."

"Question. How did the window get up higher? Answer. The boys, I suppose, raised the window higher."

And that Shriver had told the defendant and his brother that the window was left open for his benefit, and, of course, "we thought it was all right," and that, at the time of the breaking, Shriver was living with Ben Bullard.

This testimony was uncontradicted. The name of Dick Shriver was indorsed upon the indictment as one of the witnesses who had been presented before the grand jury. It appeared from the evidence that Shriver was present, outside of the court-house, after the beginning of the court on the day of the trial. He was a most important witness for the Territory. The testimony of the defendant to the effect that Shriver stated that he was living with Bullard at the time of the alleged burglary, and was authorized to enter the saloon, and that the window was partly raised for that purpose, remained uncontradicted.

It is manifest from the testimony that Shriver was himself authorized by Bullard to return, and to enter the saloon in the manner which was shown by the testimony,—that is, by raising the window of the saloon,—and that the purpose of this permission was to apprehend the defendant and his brother in the act of entering the saloon with Shriver, if they should do so. The fact that Shriver was at the time living with Bullard, and had at times tended bar, was, we think, sufficient to justify the defendant in relying upon his (Shriver's) statement that the window had been left open for him, and that he was authorized to enter the saloon at that time and by that means. Shriver was present about the court-house. It was within the power of the Territory to place him upon the witness stand and to contradict this testimony of Roberts. This it failed to do.

It was said in the case of *People v. McCord*, decided in the Supreme Court of Michigan (76 Mich. 200), 42 N. W. Rep. 1106, that: "Possibly (but we do not care to decide this) leaving temptation in the way, without further inducement, will not destroy the guilt, in law, of the person tempted, although it is a diabolical business, which, if not punishable, probably ought to be. But it would be a disgrace to the law, if a person who has taken active measures to persuade another to enter his premises and take his property, can treat the taking as a crime, or qualify any of the acts done by invitation as criminal. What is authorized to be done is no wrong, in law, to the instigator." And in this case it was said that the instigator or detective was active in the matter, and that the circumstances were such as would exonerate him and his victim from criminal responsibility, and that, "if the transaction which is the basis of the prosecution was actually designed as it was actually expected by the persons in the store, they deserve something more than censure for such a scheme." The court in that case said also that: "It is not edifying, when persons who would be horrified at being classed among criminals, forget their legal duties, and imagine that any end can justify bad means. The conviction must be set aside, and, upon the record as it stood when the case went to the jury, we cannot see how they could have convicted the prisoner, under the correct view of the law."

And it was said in 2 East, P. C. 666, that no felony was

proven, since the whole thing was done with the knowledge and assent of Mr. Bolton, and that the acts of Phillip, the servant, were his acts. We think that these remarks are applicable to the facts in this case. The evidence showed that Shriver had been used and relied upon as the detective; that he had acted as a decoy, and had induced the defendant to enter the saloon, and we think that the defendant should not have been convicted of burglary therefor, and that the inducement and consent of Shriver were the inducement and consent of Bullard; and we think that the trial court should have sustained the motion for a new trial. *People v. McCord* (76 Mich. 200), 42 N. W. Rep. 1106; *Speiden v. State*, 30 Am. Rep. 126.

The judgment of the lower court is therefor reversed, and the cause remanded. All of the justices concurring.

NOTE (by H. C. G.).—In the case of *People v. McCord*, 76 Mich. 200, above cited, the evidence was that defendant with one Flint entered a store at night where four men awaited them, who shot and terribly beat McCord. Flint admitted that he was acting under directions of the proprietors in taking McCord there. It seems that Flint had gone around with McCord to saloons nearly every night preceding this night; and that on this night McCord was seen in a drunken condition going towards his home when he was intercepted by Flint; and that he expressed his desire to go home, but that Flint stuck to him, taking him around for further dissipation, and, as McCord testified, finally prevailed upon him to go with him to the store. The Supreme Court reasoned that it would be absurd to say that Flint was guilty of burglary, when he was simply acting the part planned by the owners; and that as McCord seemed to be simply *aiding* and *abetting* Flint in carrying out the design, if Flint was not guilty McCord could not be guilty. The court not only denounced the scheme as a disgraceful contrivance to induce a man to commit crime in order to convict him, but severely condemned the brutal assault upon McCord as needless, cowardly and atrocious, and remarked that if his injuries had proved fatal, his assailants would have found it to be a very serious matter.

See this case with note on detectives and others acting as "decoys," 8 American Criminal Reports, pp. 117-126.

STATE V. RIGGS.

74 Minn. 460—77 N. W. Rep. 302.

Decided December 6, 1898.

BURGLARY: *Evidence insufficient to convict.*

Where an intoxicated person violently forces his way into a social club room and saloon where he had been accustomed to go, and of which he had been a member, for the purpose of getting liquor, knowing that there were persons within, without an intention to steal or commit a crime therein, although very disorderly and boisterous therein, he is not guilty of burglary.

Appeal from the District Court for Wright County; Tarbox, Judge. Reversed.

Ashley C. Riggs, being convicted of burglary, appeals.

W. H. Cutting, for the appellant.

H. W. Childs, Atty. Gen., and *George B. Edgerton*, for the State.

COLLINS, J. Defendant was convicted of the crime of burglary in the third degree, and sentenced to State's prison for the period of three years. He appeals from the judgment, and makes a number of assignments of error. We pass by all except the last, which is that the verdict is contrary to law and is not justified by the evidence.

In our opinion the judgment of conviction must be reversed, as wholly unwarranted. From the evidence it appears that the "Monticello Social Club" occupied a room in a building in the village of Monticello, fitted up as is the ordinary saloon, in which liquors and cigars were sold or disposed of. One Allen was in charge, as the secretary of the club, and a man named Machtel slept in the room every night.

Defendant Riggs, twenty-four years of age, who had resided in this village all of his life, had been a member of this club up to a few hours before he was arrested on the charge of burglary. He seems to have then ceased to be a member, because the amount deposited by him had been "withdrawn" from time to time. He was in this room all of the evening, and was evidently drunk, and somewhat disorderly when Allen locked the front

door, about nine o'clock. Riggs then went out the back door. Allen started towards his home, but, returning, lay down near the back door. Machtel was left in the room. He went to bed, leaving, as he said, the light turned partly down.

What occurred subsequently was fairly stated by the court in its charge, in substance as follows: Riggs came back with Hallett, a brother-in-law, and knocked at the back door. Both went away, and, returning together, Riggs kicked or knocked a hole in the door. They then left, but soon afterwards Riggs returned, and crawled into the room through this hole. Machtel then turned the light up, and Riggs crawled outside. He soon knocked on the door again, Machtel opened it, and Riggs stepped in, closely followed by Allen. The latter went for an officer, and Riggs remained in the room until he was arrested, about eleven o'clock at night. It was shown that he was very disorderly while Allen was looking for an officer; that he had a revolver, shot into the floor, and made threats against Allen with whom he had had a previous difficulty. It was also shown that, upon leaving the room for the first time that evening, Riggs, accompanied by Hallett, went to a brother's house near by, and there borrowed fifty cents for the avowed purpose of returning to the room for a bottle of whiskey.

It seems to a majority of the court that a monstrous injustice was committed when, on this evidence, Riggs was convicted of the crime of burglary. We are unable to find a particle of evidence tending to show that he broke into this building with an intent to take, steal or carry away the money, goods or chattels of another person. He was drunk, and wanted more liquor. He had borrowed money with which to buy another bottle. He demanded that the door be opened, and then, in an ugly drunken mood, kicked in the door because his demand was not complied with. He knew that either Allen or Machtel, or both, were in the room, and if, as testified to by them, but denied by Riggs, he crawled in through the hole in the door, it was not with an intent to steal.

Burglaries are not attempted or committed in the manner indicated by this evidence, and the conduct of both Allen and Machtel shows conclusively that they did not for a moment suppose that Riggs was a burglar. Evidently they regarded him as

a drunken rowdy, and, in that, they were right. He should have been punished as drunk and disorderly, not as a burglar.

The judgment is reversed, and the court below ordered to dismiss the indictment and discharge the defendant.

CANTY, J. (dissenting). I cannot concur in the foregoing opinion. This court has no right to assume that defendant knew that any one was in the saloon when he kicked in the door.

The evidence tends to prove that about eleven o'clock at night, in company with his brother-in-law, he came to the back door of the place, knocked, and listened several times, but received no answer. Then he swore, and threatened to break in and get what he wanted. The place had already been closed for the night. A witness who was concealed in an outhouse near by testified that defendant said: "I am going to have what I want out of there." "I am going to get in there, and get what I want." Then he broke in the panels of the door, stopped and listened, ran away, returned in a few moments and crawled through the hole in the door. A person sleeping on the inside turned up the light, and defendant went back and crawled out through the hole in the door. Then he went away, returned in about fifteen minutes, again knocked on the door, and was admitted by the person inside.

While the evidence that the defendant intended to commit the crime of burglary is not altogether satisfactory, I am of the opinion that it sustains the verdict. The evidence warranted the jury in finding that defendant broke into the building with intent to steal whiskey, beer or other liquor. The fact that he was somewhat drunk does not excuse the crime. *State v. Welch*, 21 Minn. 22.

I am strongly of the opinion that, if I had been the trial judge, I would never have given this defendant such an excessive sentence as this appears to be, or have sentenced him to the penitentiary at all. But we occupy towards this case the cold-blooded position of an appellate court, and have no discretion which we may exercise by showing mercy. In my opinion, defendant's remedy is by an application to the pardoning power, and not by an appeal to this court.

NOTES (by J. F. G.).—The desire of the person injured, for revenge, together with that of the State's Attorney to make a record as a vig-

orous prosecutor, frequently causes persons guilty of petty violations of law to be accused and convicted of grades higher than the crime committed. To this practice, the opinion of the majority of the court in the *Riggs Case* is a just rebuke, based on fixed rules of law, humanity, and abstract justice.

Burglary at common law consisted in breaking into the dwelling, or mansion, house of another, with intent to commit a felony. Sir Edward Coke defines a burglar as, "he that in the night time breaketh and entereth into a mansion house of another, with intent to kill some reasonable creature, or to commit some felony within the same, whether his felonious intent be committed or not." See 3 Inst. 63; 1 Hale, P. C. 549. Even as late as the statute 7 & 8 George 4, c. 29, s. 11, the punishment for burglary was death. Neither the common law, nor the statute, contemplated that minor intrusions and trespasses into even private dwellings should be classed as burglaries; but only those cases where, in the shades of night, the security of the home was violated for a felonious purpose, and it might be the slumbering family, unprepared for resistance, subjected to the merciless attack of the felon. The gist of the offense was not the fact of breaking into a dwelling-house, even though done at an unseemly hour; but the breaking for a felonious purpose. It was a well-settled rule of the common law that the dwelling-house must be one occupied as such; but in some cases the term "dwelling-house" was construed to cover outhouses within its immediate curtilage or courtyard surrounding the house.

Review of the subject by Roscoe.—As to the English authorities on this subject we adopt the following clear, concise and comprehensive review from Roscoe's Criminal Evidence, p. 280:

If it appear that the intent of the party, in breaking and entering, was merely to commit a trespass, it is no burglary; as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence, yet, if the primary intention was not to kill, it is still not burglary. 1 Hale, P. C. 561; 2 East, P. C. 509. Where a servant embezzled money intrusted to his care, ten guineas of which he deposited in his trunk, and quitted his master's service, but afterwards returned, broke and entered the house in the night, and took away the ten guineas, this was adjudged no burglary, for he did not enter to commit a felony, but a trespass only. Although it was the master's money *in right*, it was the servant's *in possession*, and the original act was no felony. *Bingley's Case*, Hawk. P. C., b. 1, c. 38, s. 37, cited 2 Leach, 840, as *Dingley's Case*, 2 East, P. C. 510; s. c. as *Anon.* Where goods had been seized as contraband by an excise officer, and his house was entered in the night, and the goods taken away, upon an indictment for entering his house with intent to steal his goods, the jury found that the prisoners broke and entered the house with intent to take the goods on behalf of the person who had smuggled them; and upon a case reserved, all the judges were of opinion that the indictment was not supported, there being no intent to steal, however outrageous the conduct of the prisoners was in thus endeavoring to get back the goods. *Knight & Roffey's Case*, 2 East, P. C. 510. If the indictment had been for breaking and enter-

ing the house, with intent feloniously to rescue goods seized, that being made felony by statute 19 Geo. 2, c. 34, the chief baron and some of the other judges held it would have been burglary. But even in that case, some evidence must be given on the part of the prosecutor to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid; but their being found in oil-cases, or in great quantities in an unentered place, would have been sufficient for this purpose. 2 East P. C. 510. The prisoner was indicted for breaking, etc., with intent to kill and destroy a gelding there being. It appeared that the prisoner, in order to prevent the horse from running a race, cut the sinews of his fore-legs, from which he died. Pratt, C. J., directed an acquittal, the intent being not to commit felony by killing and destroying the horse, but a trespass only to prevent its running, and therefore it was no burglary. But the prisoner was afterwards indicted for killing the horse, and capitally convicted. *Dobb's Case*, 2 East P. C. 513. Two poachers went to the house of a game-keeper, who had taken a dog from them, and, believing him to be out of the way, broke the door and entered; being indicted for this as a burglary, it appearing that their intention was to rescue the dog, and not to commit a felony, Vaughan, B., directed an acquittal. *Anon.*, Matth. Dig. C. L. 48. See *Holloway's Case*, 5 C. & P. 524.

General doctrine regarding specific criminal intent.—When the crime does not consist simply in the act, but in the act with a particular intent, or where the attempt to commit an act with a wrongful intent is made a crime, no conviction can be had unless the evidence shows the existence of such intent. This doctrine is well illustrated by the case of *Keeton v. Commonwealth*, 92 Ky. 522, 18 S. W. Rep. 359. In that case the accused was convicted on two indictments for robbery, he having, while in an intoxicated condition, on his way home from a picnic, accosted two persons with whom he had been on friendly terms, and, presenting a pistol, compelled them to deliver to him their money and watches; but he made no effort to conceal the property, and on becoming sober caused it to be returned to the owners. The testimony as to his mental condition was excluded by the trial court on the theory that voluntary intoxication is no defense to an accusation for a crime committed by such intoxicated person; but the court of appeals, reversing the conviction, says: "A distinction is plainly drawn between cases where the act done constitutes the offense and cases where there must be combined with the act done the intent of the accused in order to constitute the offense. For instance, where one kills another, the act done constitutes the offense; but when one takes the property of another, to make it larceny a felonious intent must be shown, and, while this may be inferred from the character of the taking, the defense may show that he was unconscious at the time, or too drunk to have any intent. *Roberts v. People*, 19 Mich. 401; *People v. Walker*, 38 Mich. 156; *People v. Harris*, 29 Cal. 678; *Wood v. State*, 34 Ark. 341. His drunkenness would be no defense to an indictment for an assault, because the act of presenting the pistol constitutes the offense and the question of intent would not be involved. The evidence offered should have gone to the jury."

In *State v. Bell*, 29 Iowa, 316, the defendant on trial for burglary asked the court to give the following instruction: "If you find from the evidence that, at the time the defendant was found in the house, he was drunk and got there through drunkenness, without knowing where he was, and with no intent to steal or commit crime, then you should acquit." The refusal of this instruction was held to be prejudicial error, there being evidence that the defendant was grossly drunk at the time that he went into and occupied a neighbor's house.

In *Chrisman v. State*, 54 Ark. 283, 15 S. W. Rep. 889, in reversing a conviction of assault with intent to commit murder, the court said: "We do not think it necessary to review on this appeal the other rulings of the circuit court complained of by the defendant. But, as the cause must be remanded, we think it proper to say that, although voluntary drunkenness cannot, as the jury were told by the court, excuse the commission of a criminal act, yet, where a person is accused of a crime such as can be committed only by doing a particular thing with a specific intent, it may be shown that, at the time of doing the thing charged, the accused was so drunk that he could not have entertained the intent necessary to constitute the offense. 1 Bish. Crim. Law, § 413. Then in *Wood's Case*, 34 Ark. 341, it was held that 'if one at the time of taking property is so under the influence of intoxicating liquor that a felonious intent cannot be formed in his mind, he is not guilty of larceny.'"

In *Schwabacher v. People*, 165 Ill. 618, 46 N. E. Rep. 809, in reversing a conviction for perjury, the court said: "It is undoubtedly true that at common law drunkenness was no excuse for crime; nor is it under the statute, except as therein provided. But where, as under the indictment in this case, it is necessary to prove a specific intent before a conviction can be had, it is competent to prove that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. The breaking and entering the house in the night time alone did not constitute the crime of burglary, but it was necessary to prove that the act was done with the specific intent alleged in the indictment,—that is, to steal the goods and chattels therein of Mrs. Bell."

In *Bartholomew v. People*, 104 Ill. 601, the court said: "At common law, where it required a particular intent in doing an act to constitute crime,—as, for instance, larceny, where the intent to steal must accompany the act of taking,—it was held it may be shown in defense that the party charged was intoxicated to that degree that he was incapable of entertaining the intent to steal, and that neither he then, nor afterwards, yielded assent of his will." Citing 1 Bishop on Crim. Law (3d ed.), sec. 490; *United States v. Routenbush*, 1 Baldw. 517; *Swan v. State*, 4 Humph. 136; *Pigman v. State*, 4 Ohio, 555; *Kessey v. State*, 3 S. & M. 518; 1 Wharton's Crim. Law (7th ed.), sec. 41.

In the case of *Crosby v. People*, 137 Ill. 325, 27 N. E. Rep. 49, the court said: "Drunkenness was, therefore, at common law, as under our own statutes, no excuse for crime; but where the nature and essence of the offense is, by law, made to depend upon the state and condition of the mind of the accused at the time, and with reference to

the acts done and committed, drunkenness, as a fact affecting the control of the mind, is proper for the consideration of the jury, for if the act must be committed with a specific intent to constitute the crime charged, and the defendant is incapable of forming any intent whatever, the offense has not been committed."

In *Lyle v. State*, 31 Tex. Crim. Rep. 103, 19 S. W. Rep. 903, a conviction for perjury in testifying that no gambling had occurred at a certain time and place was reversed. The defense was that the accused at the time of the gambling was intoxicated. In reversing the conviction the court said: "The court should have instructed the jury that they might consider this evidence with all of the other testimony in the case for the purpose of determining whether the defendant knew the game was played, or whether at the time he made the statement he remembered having seen the game played, if in fact he did see it."

In *People v. Harris*, 29 Cal. 678, the defendant was indicted and convicted for voting twice at one election. The conviction was reversed because the court excluded evidence of intoxication, such evidence being admissible to prove that at the second voting the defendant was not conscious that he had previously voted on the same day.

In *Lytle v. State*, 34 Ohio St. 196, a conviction for testifying falsely regarding a certain assault was reversed because the trial court had excluded evidence tending to show that the defendant at the time of the assault was very drunk. In reversing the conviction the court remarked that it was well known that some people were rendered oblivious to their surroundings by intoxication, and that others were partially incapacitated, so that they were incapable of seeing things in their true relation, and often conceived distorted, incorrect and imperfect ideas of what transpired around them.

In *Roberts v. People*, 19 Mich. 401, a conviction for assault with intent to commit murder was reversed because the court below refused to instruct the jury that intoxication of the defendant was proper to be considered in determining whether or not he entertained an intent to commit murder.

In *Wilson v. State* (Tex.), 19 S. W. Rep. 255, a conviction of wilfully driving away a calf was reversed because the evidence did not show a criminal intent. The accused and his hired man were hunting cattle. The accused found a cow and calf of his own and a motherless calf sucking the cow. He told the hired man to drive them all home, remarking that if the owner came he could get it, but if not the cow might raise it and keep it from dying. The calf remained at the accused's place about ten days, no effort being made to conceal it and no claim of ownership asserted. When the owner claimed it the accused told him he could come and get it, etc. In reversing the conviction the court said: "With the exception of the difference in their respective statements as to what passed in this conversation, there is no evidence in the record inconsistent with or contradictory of the defendant's own testimony, and the question presented is whether or not the facts show a violation of the statute. Was the driving away wilfully done? Was the calf removed from his accustomed range with evil intent, and without reasonable grounds to believe the act to be

lawful? We are of opinion that it was not. *Thomas v. State*, 14 Tex. App. 200. The judgment is reversed and the cause remanded."

In the case of *State v. Brown*, 104 Mo. 365, 16 S. W. Rep. 406, a conviction for robbery was reversed because the trial court failed to instruct the jury that no conviction could be had for robbery unless the jury find from the evidence that the defendants took the money with felonious intent. In that case the defendants denied that force was used; but it was admitted that a five-dollar bill was taken or jerked from the hand of the prosecuting witness, he being indebted to one of the defendants for the loan of a dollar. The court in reversing the conviction says: "Robbery is compounded of larceny and force. The defendants were not guilty of robbery unless they took the money from the prosecuting witness without an honest claim to it, or any of it, and with the intent to deprive him of the ownership therein."

In *Nelson v. State* (Tex.), 26 S. W. Rep. 623, a conviction for a theft was reversed, the opinion of the court being in part as follows:

SIMKINS, J. Appellant was convicted of theft, and his punishment assessed at two years in the penitentiary. Appellant was indicted in three counts, charging robbery, embezzlement, and theft of over \$20. Upon trial the State dismissed as to the first two counts. The facts show that appellant was confined on the county farm for gambling; that one evening in April, 1893, appellant approached the guard, one Cummins, under the pretense of borrowing his knife, and seized him, crying out: "Come on, boys. Now is the time to get our liberty,"—and, assisted by other convicts, disarmed the guard, one of the convicts taking his gun, and appellant his pistol; and they left him lying bucked and gagged, and escaped. The gun and pistol were subsequently recovered from persons to whom the appellant said they were delivered to be returned. The witness Cummins states that the appellant used great violence to him, and they took away his gun and pistol by force. The witness was considerably frightened, and believes they would have killed him if he had offered more resistance than he did. If a fraudulent intent has been proven in this case, then the crime committed was robbery, and not theft; for all the distinct modes by which robbery may be committed are to be found herein. The property was certainly taken by assault, by violence on the person, by putting in fear of life or bodily injury. Willson's Cr. St., § 1246. But the State dismissed as to the robbery, presumably on the ground that it could not prove the fraudulent intent, but conceded that the violence used by the convicts to the guard Cummins was for the purpose of gaining their liberty, and not to obtain and appropriate his property. Appellant, taking the stand as a witness, testified that before leaving the county they placed the weapons in the hands of friends, to be returned to the owner. There is nothing contradicting this statement in the record, except that the person to whom the pistol was delivered sold it for a small amount, which the owner had to repay, for which sale appellant could hardly be held responsible in this case. It certainly does not appear that they appropriated the arms to their own use and benefit. In this connection, the record shows the jury requested further instructions on the question as to what length of time the prop-

erty charged to have been stolen must be in the possession of the party taking it to constitute theft. The court answered; "The law fixes no length of time. A moment's possession is sufficient." While the answer is correct, it was not sufficient in this case. The jury should have been told that a moment's possession would be sufficient if taken with the fraudulent intent to appropriate to his own use and benefit, but, if such intent did not exist at the time of taking, no subsequent holding would make it theft.

THOMPSON V. STATE.

117 Ala. 67—23 So. Rep. 676.

Decided June 6, 1896.

CHANGE OF VENUE: *Public excitement.*

A change of venue should be granted where public feeling against the defendant is so strong that mob vengeance was prevented by the military, and a special session of court convened in response to popular demand for speedy punishment.

Appeal from Circuit Court of Morgan County; Hon. James J. Banks, Judge.

Appellant, a negro, was accused of the rape of a white girl about twelve and one half years of age. He was arrested on June 8, 1897, and tried at a term of court, called for his trial, which met July 26, 1897. On July 27, 1897, he made application for a change of venue, which was overruled; being convicted, he appealed. Reversed.

O. Kyle and *S. T. Wert*, for the appellant.

Wm. C. Fitts, Atty. Gen., for the State.

McCLELLAN, J. Upon a careful consideration of the evidence adduced on the motion for a change of venue in this case, the court is satisfied that it should have been granted. The crime charged was of a character to produce the greatest public indignation. The trial was had within a short time after the alleged commission of the offense came to the knowledge of the public,—as soon as a special term of the court, called in obedience to a public demand for speedy punishment, could be convened and held. And the affidavits and other evidence show that

the public were so greatly aroused against the defendant that it required the promptest and most vigorous action of the executive officers of the State from the governor down, and including the military, to protect the defendant from mob violence and summary execution; and, further, that this state of feeling continued down to and through the trial, and must have had such effect upon the jury as that their verdict was little else than the registration of the common belief of the people that the defendant was guilty, and a mode of carrying out the public purpose to take his life. The trial was not, and could not, under the circumstances then existing, have been, fair and impartial. The court erred in denying the change of venue moved for by defendant, and for that error its judgment must be reversed. Of the other exceptions reserved many are palpably without merit, and the others will probably not arise on another trial. Reversed and remanded.

GALLAHER v. STATE.

40 Tex. Cr. App. 296—50 S. W. Rep. 333.

Decided March 15, 1899.

CHANGE OF VENUE: MURDER: *Local prejudice—Prejudice of jurors—Confession—"Sweat-box."*

1. Where nineteen disinterested citizens swore that the defendant could not have a fair trial in Galveston county, because of the violent and universal prejudice against him, showing their means of knowledge, and that the daily papers were filled with articles and pictures of a prejudicial character, and that photographs relating to defendant's alleged guilt were exhibited on the streets, and that the general expression of opinion among all classes of people was that he was guilty and ought to be hanged or lynched or burned, *held*, that it was an abuse of discretion in the trial court to deny the motion for a change of venue, notwithstanding that the sheriff, chief of police and district attorney swore that defendant could get a fair trial, and that there was not such general prejudice against defendant.
2. Where jurors said they believed the defendant guilty from all they had heard and read, but would acquit him if he proved himself innocent, and in response to court's questions said they believed they could give him a fair trial, *held*, that challenge for cause should have been sustained.

3. A confession obtained by persistently badgering and teasing the defendant, several persons taking turns at it, in what was casually referred to as a "sweat-box" examination on the trial, considered, and held not to be free and voluntary.

Appeal from Galveston County; E. D. Cavin, Judge.

Virgil Gallaher, convicted of murder in the first degree, appeals. *Reversed.*

D. D. McDonald, Newton J. Skinner, and Arthur J. Krectch, for appellant.

Robt. A. John, Assistant Attorney-General, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

The evidence for the State showed that appellant was the son of deceased, Mrs. Kate H. Gallaher, and that at the time of the homicide he and his mother were living together in a house in Galveston, alone; that on Saturday night, August 15, 1897, appellant entered deceased's room, and cut her throat with a razor. The corpse of deceased remained in the building all the next day, which was Sunday. On the following night appellant attempted to burn the house, and, after several unsuccessful attempts, at length succeeded in setting it on fire. Before the fire had made great headway, it was discovered and extinguished. The remains were found partially burned, but not consumed, and the evidence of death by violence was apparent. The motive imputed was robbery. The State's case depends on circumstantial evidence, in connection with the confessions of appellant. On the trial appellant relied on a plea of not guilty, and he introduced some evidence tending to show his insanity or mental aberration at the time of the alleged homicide. Appellant also made a motion for a change of venue, and, as a disposition of this case depends greatly on the action of the court in regard to said motion for change of venue, we will summarize from the record enough to show the questions raised, and to bring in review the action of the court.

Motion was made by appellant to change the venue of said cause on the ground "that there exists in Galveston county so great a prejudice against him that he cannot obtain a fair and impartial trial." This was sworn to by appellant, and was sup-

ported by the following compurgators, to wit: William Slater, J. R. Snedeker, E. C. Green, M. L. Eggers, R. P. Sargent, L. L. Cretin, John A. Harrington, C. A. Horseley, and Newton J. Skinner. This motion was controverted by the State on the affidavits of J. K. P. Gillaspie, district attorney; Henry Thomas, sheriff; and W. C. Jones, chief of police of said Galveston city. Said affiants stated "that they were acquainted, or had been made acquainted, by inquiry from every available source, with said compurgators, and are cognizant of their means of knowledge, and all the matters stated by them, and each of them, in their said affidavits, and that their said means of knowledge is not sufficient to support and justify the statements contained in their said affidavits; that said Galveston county is large in area, a part of which is on the island of Galveston, and a large part on the mainland, and containing a large population, engaged in various numbers and kinds of occupations and business, and affiants state that it is impossible from the conditions existing that said compurgators could have the knowledge stated in their affidavits; and further state that, from a long and intimate acquaintance, obtained from official and other sources, of the qualified jurors in Galveston county, there is no such prejudice against Virgil Gallaher as that he cannot obtain a fair and impartial trial in said Galveston county, and that the statements so made by said compurgators were ignorantly made, and are in fact untrue."

On the issue thus joined appellant introduced nineteen witnesses, including, besides the compurgators named above, the following additional witnesses: W. C. Williams, Henry Bee, F. G. King, Frank Corbin, Lawrence Bacigaloupi, H. Rakel, Thomas P. Duffy, F. G. Leaverenz, J. T. Morris, and F. Freund. Most of these witnesses had lived a number of years in Galveston county, some as long as thirty-two years, and the most, if not all, resided in the city of Galveston, and were well acquainted in said city, pursuing various occupations,—some butchers, some salesmen, contractors, merchants, saloon men, newspaper men, tailors, etc. The examination of said witnesses took a wide range, but appears to have been confined to three salient points: (1) The publication of an account of said homicide in the Galveston Daily News and in the Evening

Tribune. The circulation of these papers was shown to be large in said county, and to have been greatly increased during the three or four days succeeding the homicide. The normal daily circulation of the Galveston News was from 3,400 to 3,700, and on the day after the homicide was discovered 1,200 to 1,500 extras were issued. The normal daily circulation of the Evening Tribune was about the same as the News, and on the 16th of August, the day of the discovery of the homicide, and for two days thereafter, it was greatly increased, the extras amounting to about 2,500 for the three days. The confessions of appellant and an account of the homicide appear to have been published in said papers. (2) It was also shown that there was exhibited on the sidewalk, in one of the most public streets of the city of Galveston, in the show case of a leading photographer, photographs of the house and various scenes connected with the homicide. Said pictures were designated by writing, showing what they were, such as "the room where Gallaher killed his mother," etc. These pictures were on public exhibition about a week, and it was shown that a large number of people visited said place, and viewed and discussed said pictures. Said photographs were finally removed from the street at the instance of the sheriff. (3) It was also shown that other defamatory statements were circulated in regard to appellant, in connection with said murder, to wit, that he had outraged his mother before killing her; also other defamatory statements as to other matters of a criminal character charged against him.

We quote from the testimony of some of said witnesses, as presenting a fair sample of what appellant's testimony was in this regard, the record being too voluminous to quote all:

William Slater testified: "That he was a sewing-machine agent, and had lived in Galveston about seventeen years. That he made an affidavit in this case. That he had formed the opinion from the animus expressed by the people at large. During the last four days since this case has been court-room talk, I have heard remarks every day in the court room and out of the court room; have heard remarks here in the lobby. One of the remarks was that, 'If I was on the jury, I would hang the defendant.' Another remark struck me very forcibly: 'I would

like to see that bastard hanged.' These remarks were made by men. I have heard other remarks made, the substance of which is something like this: 'If I had my way with him, I would lynch him;' or, 'If I had my way with him, he ought to be burned;' or, 'If he was only up in my county where I used to live, he would never have a trial at all.' They were not made upon my solicitation. They have been made on many occasions. . . . I have not heard any opinion concerning his innocence or concerning his ability to get a fair trial. On cross-examination he stated that he was a white man, and boarded at Annie West-hall's, a colored woman; that he was a sewing-machine agent; that his business brought him in contact with both men and women; that he did not know the number of jurors he had talked with; that he had talked with as many as ten qualified jurors, but could not name any of them."

John A. Harrington testified: "That he was a lawyer, and had formerly been attorney for appellant. That he knew a great many people in Galveston. That he had made it his business, while acting as attorney for defendant, to find out the feeling towards defendant. He stated that he had heard expressions from various persons highly disparaging towards appellant, not only about the case itself but as to other matters. Among others, that it was reported that one of the reasons that defendant committed the deed was that he had gone to the house after having left the dive where he had been carousing, and, under the influence of excitement and evil passions engendered at that place, he made a criminal assault upon his mother. There were other remarks, but they were much less heinous than that. Witness stated that he had talked to as many as 100, and perhaps as many as 500, qualified jurors. That he only knew, in a general way, about the mainland and the qualified jurors there. That it was possible to get twelve qualified jurors in the county, if all the time was devoted to that object. That it would be easier to obtain a fair trial anywhere else. That details and statements, made through the press and otherwise, would prejudice the case, as also the photographer's pictures which were exhibited on the street. That he finally got the sheriff to go there, and direct those pictures to be taken

down. That these things were calculated to create a feeling and excitement in the community that was to the disadvantage of defendant."

F. G. King testified: "That he had resided in Galveston about six years, and was a tailor by trade. Had heard a great many people express their opinion with regard to the prisoner's guilt or innocence. The majority of them was that he ought to be executed. That he had probably heard in the neighborhood of fifty express that opinion. The universal opinion of the majority was that he ought to be executed."

C. A. Horseley testified: That he was in the hardware business, and had resided in Galveston twenty-seven years. That he had read the Tribune and News about this case when it happened. That he had heard other remarks in connection with the case, but, as he was on the grand jury that found the indictment, it might not be right for him to tell them. That at the time the crime was committed he did not hear the same class of stories that he heard afterwards. The substance was that he had committed an outrage on his mother. "It was my impression that I have heard it from a considerable number of people. I have heard other stories. The circumstances in which the body was found was not at all in compliance with the statements in the paper and making corroborative evidence as to the truth of the stories flying around." That he saw the photographs on exhibition in front of Morris'. That he heard expressions at that time prejudicial to defendant. That, while he was looking at them, Mr. Morris said he must take that down, and he asked him, "Why?" He said the sheriff, Mr. Thomas, had asked him to take them down, because it was about to cause a prejudice against the prisoner, but that the chief of police did not care whether he took them down or not. That he never heard any one express an opinion about appellant being innocent. That he made the affidavit simply to see fair play. That he had said several times, in spite of the evidence published in the newspapers and in spite of the evidence heard before the grand jury, that it would be very hard to get a jury. That it was impossible to get a man upon the jury but what would be influenced by information heard on the outside. That "it was impossible but that some of the jury would say that they knew so

and so, and stories will influence juries. I think the rumors I have heard will cause prejudice fully as much as the newspaper reports."

Thomas P. Duffy stated: That he had lived in Galveston twenty-seven or twenty-eight years. That he had been quarantine inspector and bailiff for the last five months. That the expressions he heard were as to defendant's guilt. That he had heard rumors which, if true, would be greatly against appellant, other than that he was charged with murder. They were that he had committed an outrage upon the deceased, his mother. That he had heard a number of expressions,—did not know how many. People would engage in conversation about defendant, as to what the papers had to say. Saw the pictures exhibited on the sidewalk. He said that, notwithstanding the rumors and talk, he thought appellant could get a fair and impartial trial here. That he thought they could get twelve men out of 9,000 who could fairly try the case.

A number of other witnesses stated that they had heard it reported that appellant had outraged his mother, and stated that the expressions they had heard were prejudicial towards defendant; but a number of them stated that they thought appellant might get a fair trial in Galveston county.

E. C. Green testified: That he was a resident of Galveston county, and a contractor and builder. That he had talked with a number of persons on the subject of defendant and his crime. That every one he had talked to appeared to think he was guilty, and referred to his confession. That he had heard several punishments suggested. That he hardly knew the worst. That defendant had heard some persons say that he ought to be burned at the stake, possibly on one or two occasions. That he had heard the other rumor, that he had ravished his mother. From what he had heard, in his opinion it would hardly be possible to get twelve fair and impartial men to try the case.

On the other hand, W. C. Jones, for the State, testified: That he was chief of police of the city of Galveston. Had lived in that community since 1852, and knew a great many people in the county. That he did not think the gentlemen who made the affidavits had the means of knowledge as to the statements they had sworn to. That, from personal knowledge of the community

and the people, the matters stated in the affidavits were not true. That, from his knowledge of the community, the defendant could get a fair and impartial trial. That he thought most of the persons who had appeared upon the stand and made affidavits were credible persons, and that they testified as to what they honestly believed to be true, but they did not have the means of knowledge necessary to state the facts. That he did not swear that the defendant could get a fair and impartial trial here. That he was a witness in the case, and was before the grand jury. That he could not tell how many of the venire lived outside of the city of Galveston. That at one time he was very well acquainted with the people in the county outside of the city, but not now. This witness stated that he had heard the rumor that appellant had outraged his mother. That he attached no importance to it. That he knew defendant committed a burglary on one occasion. That he saw the articles, and returned them to the owner on the order of Gallaher. That he had not heard the talk that he had outraged other women in the town. That he had heard the expression that there was no punishment too great for appellant. That he had made that statement himself. That he had made it upon appellant's own statement to him. That he may have repeated that to other people in his office; in fact, there was another person there at the same time and heard it. He stated that he firmly believed that appellant could have a fair and impartial trial, and that was his opinion. Witness stated that Mr. Morris came to him in regard to taking the pictures down, and wanted to know whether he would force him to take the pictures down. That he told him he did not think it was within his authority.

Sheriff Thomas testified, substantially, that the men who made the affidavits and testified were credible persons; but he did not think they were sufficiently posted about the sentiment in the community to make the affidavits. He could not say whether their opportunities had been better to know what the people thought about it than his. The special venire list was read over to this witness, which was composed of 150 names. He stated that all of said venire lived in the city of Galveston, except the following: McLean lived down the island some six or seven miles. W. H. Aldredge lives about a mile outside of the

city limits, down the island. Joe Aikens lived at Hitchcock, on the mainland. C. A. Ratisseau lives down the island. That when they summoned talesmen they usually summoned them from the city; never had occasion to summon them from anywhere else. Witness stated that he only expressed his opinion founded upon information when he said a fair and impartial trial could be obtained in Galveston county. There are 1,500 to 2,000 voters outside of the city, on the mainland.

Gillaspie, the district attorney, stated that he thought the defendant could get a fair and impartial trial in Galveston county, and that there was no such prejudice against him as would preclude that. That he believed the compurgators who made the affidavits did not possess the means of knowledge of the facts stated. That he believed persons had expressed themselves more freely to him on the subject, on account of his official position than otherwise. That since the commission of said offense he had spent a whole term of the court in the county, and a portion of the present term, some five or six weeks in all out of six months. That he had formed his opinion during the six weeks he had spent in Galveston out of the five months since the commission of the offense. That he had not heard a great many people express their opinion as to appellant's guilt or innocence. Some expressed themselves adversely, and a number had expressed themselves uniformly that he could get a fair and impartial trial in the county. He stated that the only rumor he had heard circulated against appellant was that he had filched money from his mother.

The court, after hearing the testimony *pro* and *con* on the motion for change of venue, overruled the same, and appellant reserved his bill of exceptions.

In *Randle v. State*, 34 Tex. Cr. R. 43, 28 S. W. Rep. 953, this court laid down the doctrine that prejudice and prejudgment mean one and the same thing, and that, if it was shown in the county that there was such prejudgment of the case as that appellant could not obtain a fair and impartial trial, the venue should be changed. And this opinion was adhered to and followed by a majority of the court in *Meyers v. State*, 39 Tex. Cr. R. 500, 16 S. W. Rep. 817. The writer of this opinion dissented from the views entertained on this subject by a majority

of the court, but in that connection stated "that a case may occur of such startling atrocity as not only to create the formation of an opinion in regard to the guilt or innocence of the party accused of crime, but also to engender a personal prejudice or animosity against such person; that is, the case itself may be so horrible as to engender a personal prejudice against the person accused of perpetrating it." It occurs to us that this case certainly comes within the modified view of the principle laid down in the *Randle Case*, as above indicated. The crime here alleged against appellant was of a most atrocious character; that is, that he not only murdered a loving mother, who was kind and indulgent to him, by cutting her throat with a razor, while she was asleep, for the purpose of robbery, but that he afterwards undertook to destroy all vestige of his crime by cremating her body. This occurred in the city of Galveston, where a great majority of the people who live in the county of Galveston reside. Not only so, but it was shown that the Galveston News, one of the great daily journals of the State, is published in that city; that it contained an account of the circumstances connected with the homicide, including the confession of appellant; and that this account was also contained in another daily paper of large circulation published in said city, to wit, the Tribune; that the circulation of these papers during the three days following the homicide was greatly increased on account of this very homicide, and the startling circumstances connected therewith. In addition to this, photographs of the appellant and his mother, with different views of the scene of the homicide, were put on exhibition in one of the principal streets of the city of Galveston, and remained there for several days, being viewed by crowds of people. The homicide, and the circumstances connected therewith, were matters of conversation among all classes of society for a considerable length of time. Expressions were shown as coming from a number of persons that appellant should be hanged; that he should be executed, either by hanging or burning; that no fate was too bad for him. In connection with this, it was also made manifest that other reports of an exceedingly prejudicial character were circulated in regard to appellant, and that such reports gained credence and were widespread throughout the city of Galveston. Wit-

nesses from all classes of society testified in regard thereto. Some nineteen witnesses were produced on the part of appellant, none of whom were shown to have any particular interest in him, but who testified to the sentiment of the people regarding the guilt of appellant. All seemed to believe him to be guilty, and all seemed to believe that there was a great prejudice against him, both on account of the murder and its publicity and other reports concerning appellant. Against this array of testimony the State marshaled but three witnesses, each of whom, it seems, was interested in the prosecution; one being the sheriff, another the district attorney, and the other the chief of police of the city of Galveston. It is true they did not impugn the integrity of the compurgators testifying on the part of appellant. They only testified as to their credibility in connection with their means of information. But we submit that the volume of testimony here offered on the part of appellant—coming, as it does, from a number of disinterested witnesses, men long residents of the city of Galveston, and pursuing various vocations—is entitled to more weight than that of only three witnesses who testified for the State. We would not be understood as disparaging the integrity of the State's witnesses. We only mean to say that the mass of testimony offered by appellant, coming as it does, outweighs, in our opinion, the testimony offered on this subject by the State. And we believe if there can be a case where prejudice can be engendered on account of the crime itself, and the reports circulated in connection therewith, that this is such case. We believe that the court erred in not changing the venue on the showing made.

It has been the uniform holding of this court that the question of a change of venue is a matter resting within the sound discretion of the court, and, unless there is abuse of such discretion, the action of the lower court will not be revised. Judged by the matters contained in the bill of exceptions on this subject, we are constrained to the opinion that the proper discretion of the court required a change of venue in this case. If we look beyond the testimony itself and what occurred during the trial, we are strengthened in this view. The venire of 150 men, taken almost entirely from the body of the city of Galveston, was soon exhausted, resulting in the selection of but two jurors. A special

list of talesmen containing 200 jurors was then summoned. Of these, it appears that 165 of the 200 talesmen were summoned from the mainland, the balance being summoned from the city of Galveston. Nearly 400 men were examined altogether before the jury was obtained. A number of the jurors who were summoned had formed opinions in the case, and appellant was compelled to take some who had formed opinions. All this shows that appellant was very much hampered in the selection of the jury by the fact that the crime and its notoriety had been spread through the county, and that on this question a great many persons had formed opinions; not only so, but were prejudiced against appellant on account of the atrocity of the offense and other circumstances rumored against appellant. While it is a circumstance in favor of the action of the court in any case that a just result has been reached, yet this, of itself, is not a complete answer to the proposition. Our law apprehends that a defendant shall have a fair and impartial trial, and to this end it is provided that he shall not be tried in the county where the prejudice is so great against him as that he cannot expect such trial. Taking it for granted that prejudice is not simply prejudgment, but is prejudgment coupled with some degree of ill will, it will be seen from this record, not only that a great number of the citizens of Galveston had formed an opinion adverse to appellant, but that it went to the extent, on account of the atrocity of the crime charged against him and other circumstances of a defamatory character in circulation in the community in connection with the offense, such as to prejudice them against him and his cause. Under the circumstances, he did not have as fair and untrammelled an opportunity to select a jury as if no such prejudice existed against him; but throughout, in the selection of the jury, he encountered this prejudice, which was calculated to seriously impair his rights in the selection of the jury; and as prejudice is often of a sinister character, and remains under cover, it is difficult to guard against, and it may be in this case that such prejudice found its way into the jury box. This is made manifest, as stated before, in the selection of the jury. We will discuss this question, however, more fully in connection with appellant's bills to ex-

ception numbered from 3 to 9, inclusive, all of which were taken to the action of the court in impaneling the jury.

The jurors Outerside, McHenry, Cheek, Eggert, Pennock, Wisrodt, and Rogers stated that they had formed opinions in the case. The first five were challenged peremptorily, and Wisrodt and Rogers were taken. Several of them said they shared the public opinion considering the defendant guilty, but that, if he could prove himself innocent, they would let him go free; otherwise, they would not do so; that at present they had an opinion that said defendant was guilty. Each of said jurors, after he had been examined by counsel, was then examined by the court, to which the general response was that they could give the defendant a fair trial; that they knew nothing about the case, except what they had read in the newspapers and what they had heard as rumors about it; that they could discard the opinions they had on the evidence put before the jury, and would not be influenced by the opinion formed.

As to the juror, Rogers, who was examined at length, the appellant's challenges being exhausted, he was compelled to take said juror. The record presents his evidence in full, being questions and answers. We gather therefrom that said juror had read what the newspapers said about the homicide at the time the tragedy occurred, and that he had heard a great deal about the defendant and the case, and that, from the newspaper reports and the expressions of opinion that he had heard, he thought defendant guilty as a matter of course, and that he entertained the opinion then that he was guilty; that recently—what he had heard since the trial had been up on motion for change of venue—his opinion as to the guilt of defendant had been strengthened, and that it would be necessary for defendant to prove himself innocent before he would acquit him; that it would not require a great deal of evidence on the part of defendant to change his mind in that particular. On cross-examination by the State, he stated that he felt that he was in the condition of mind to go into the jury box and try the case according to the evidence adduced on the trial; that the opinion he had was not to such an extent as not to permit him being a juror; that he thought he could consider the testimony without

weighing the opinion that he then entertained at all; that he could go into the jury box, and give defendant the benefit of the presumption of innocence, until the proof satisfied him that he was guilty. It is further manifested by affidavits in this record that this juror, Rogers, while in the jury box, was among the first to insist on capital punishment for appellant, and the affidavit further suggests that he used against appellant matters not in testimony. While this is denied, yet it is suggestive that this juror, Rogers, was not a fair and impartial juror. The record shows that he had a fixed opinion, and, while he formed it from newspaper accounts, that these newspapers detailed all the evidence, including appellant's confession. In our opinion, the court should have sustained the challenge to this juror for cause. *Suit v. State*, 30 Tex. Crim. App. 319, 17 S. W. Rep. 458; *Shannon v. State*, 34 Tex. Cr. R. 5, 28 S. W. Rep. 540.

Appellant, by several bills of exception, objected to the introduction of the confessions of appellant,—said confessions being made to Jones, chief of police, Geehan, reporter for the Galveston News, and Chubb, reporter for the Galveston Tribune,—on the ground that said confessions were made while defendant was in custody, and were not freely and voluntarily made, but were induced by coercion; and, as to the confessions made to the reporters, that, in addition, the confession to them was made long after the warning by the sheriff and chief of police, and at a time when said defendant was not mindful of the warning previously given to him. The first two bills of exception relate to confessions made to Jones, chief of police. The bills set out the confessions in full, and state that said Jones was permitted to testify to same, and then proceeds to state that said testimony was objected to at the time it was offered upon the following grounds: "That said so-called 'confession' was not freely and voluntarily made, but was forced on defendant, who was at the time under arrest, by a course of persuasion and accusation of more than an hour's duration, and which was participated in by the chief and deputy chief of police of Galveston, a reporter, and several officers of the police and detective force of said city, which said course of treatment was calculated and intended to so intimidate and overcome said defendant as to procure from him some statement directly implicating himself with the com-

mission of said homicide; all of which is more fully and specifically set forth in the statement of facts filed in said cause. The court overruled said objection, and admitted said testimony, to which appellant excepted." The court appends the following explanation: "This approval is not to be taken as certifying the matters stated above as ground of objection were true in fact, but only that they were stated by counsel for defendant as grounds upon which he objected to the introduction of the evidence." Of course, this qualification of the judge would ordinarily, under the rulings of this court, eliminate this question, as the bills do not set out the facts under which the confession was made, but merely urge against the admission of said confession objections based on the grounds stated. These bills, however, contain a reference to the statement of facts filed in the cause, constituting the predicate for the admission of said testimony. The judge's qualification would not appear to nullify this reference, but only eliminate the grounds of objection stated, as not constituting a certificate of the predicate facts. If we refer to the statement of facts, we find that much testimony was elicited on the question as to whether or not the predicate was sufficiently laid for the introduction of said testimony.

On this subject we summarize from the evidence of W. C. Jones as follows: "It would be hard to say how long he was in my office before he made the confession to me. Don't know whether it was a half hour or an hour. Know it was no longer than two hours. It was a half hour to an hour. A portion of the time I was writing at my desk. During this time they were talking. He did not remonstrate about being questioned. He made one remark that I recollect very distinctly before they went out, and that was that he would not be bulldozed into anything. He referred particularly to one Dave Jordan. I do not think that Jordan brought the shirt into my office. It was either Amundsen or Murphy. One brought in the shirt, but Dave Jordan took the shirt off the desk in the northeast corner of the room, and came towards defendant, and remarked, 'Here is the evidence of your guilt; you might just as well admit it,' or something to that effect. I did not see Jordan turn up one of the cuffs, and point to a stain on the inside of the shirt, just behind the cuff, and did not hear him then say, 'Here is the

blood of your mother upon this shirt.' They were all questioning him at the same time. . . . They kept on questioning him further, and trying to get a statement from him. We wanted to find out the truth. That is the rule with every prisoner, in regard to murder, that they have. They question him very close. You may term it a 'sweat-box system,' if you like; I don't so consider it. No; I do not think my office can be called a 'sweat-box.' Defendant made the remark that he did not want to be bulldozed when Dave Jordan came at him with this shirt. I do not recollect the exact details. I think it did not seem to intimidate him. I mean, by 'came at him,' that Jordan picked up the shirt from the table or desk where it had been laid, and had the shirt in his hand, and walked across the room to where defendant sat. In a way, I think he charged him with the murder of his mother. Chubb might also have taken the shirt in his hand at that time, and gone up to him, and said, 'You have killed the best friend you have ever had in the world.' There was a good deal that went on there that morning. The officers each took a turn at him. . . . I think that, immediately preceding the confession he made to me and Deputy Chief Amundsen, he was carefully and closely questioned in my office for an hour or more. I think these officers questioned him very closely. I think he was questioned with all the ability at the command of those officers. I believe they made the best efforts they knew how, in their questioning of him, to make him make a true statement of the case. He was very free to talk, and insisted upon talking, but at this time he did not admit any connection with the crime itself, because he strenuously denied that. I do not recollect whether he denied it once or many times. He strenuously denied it all this time he was questioned by two detectives, one or two officers, myself, and the deputy chief. The News reporter was in there part of the time. . . . After they all went out of my office, we had some few words. I do not recollect exactly the tenor of them. And defendant sat in the chair with his head thrown back, with his eyes about half closed, I think for about five minutes, when he remarked to me, 'I want to tell you this thing exactly as it happened.' I said, 'Hold on, I want some one else

present if you are going to make a confession.' He said, 'I would not do it while they were in here.' I thought he had reference to the manner of Jordan. . . . He made his statement without any questioning at all until about through. Before he made it, I again told him that whatever he said would be used against him as evidence. He sat with his eyes half closed, and he then said to me: 'What I said in the statement that I made to the reporter Chubb was not correct. It was not true, and I now will make a true statement of what occurred.'" He then made the confession which was introduced in evidence.

We summarize from Dave Jordan's testimony for the defense as follows: "I remarked to the chief that morning that he was not the boy I had known before; that there was something the matter with him. I thought he might be in a hypnotic state, or he was a spiritualist. I thought at the time his condition was so pronounced that he was under hypnotic or some other influence. After I got through talking to him about the shirt, I left the room. He did not request all to leave the room except the chief. I left the room because I was through with him. He had not made the confession to me, but I knew he would. That is why I was through with him. I knew that he would confess, because of my knowledge of men. The purpose of my whole examination was to get him to tell the facts. I knew he would make a statement. I accused him of killing his mother on Sunday morning. I pictured the case to him. I showed him the garment. I told him that was his mother's blood. I did not know whether it was or not. The purpose of making that statement to him was I wanted to get a statement from him. No one, to my knowledge, told him if he would make a statement they would protect him from violence. During this whole hour and a half no remark was made to him to the effect that he would be protected if he made a statement; nothing of the kind, in substance. I asked him to make a statement. I told him it would be better for him to relieve his conscience. I told him he would be relieved in conscience if he did. He denied the crime. He never connected himself with the act of killing. That is why I kept at him. All I wanted was to get an account of the killing itself. I had to put the questions in many differ-

ent ways to him. The reason, when I considered him in that condition, that I pressed these questions upon him, was I knew he was guilty. I was satisfied that he was the guilty party."

There is other testimony in the record bearing on this predicate. All the testimony tends to show that from an hour to an hour and a half appellant was in the office of W. C. Jones, chief of police. The chief and several deputies and detectives were present and two newspaper men, and during all that time appellant was closely interrogated by the parties then present. He was beset by first one and then another. For a long time he persisted in his denial, but at last yielded, and agreed to make a true confession, and requested all to go out except the chief of police. The chief brought in Amundsen, a deputy, and the confession was then made. He was very much broken down by the course of his treatment by the officers and detectives. They describe him as exhausted, with his head thrown back, and his eyes closed, when he made the confession; and one of them states that he was very weak, but not quite collapsed. We do not quote from the defendant's own testimony, but his evidence is stronger than that of the State on this line, indicating that the officers harassed and badgered him, and that he was overcome by their coercion and persuasion.

Our statute is very guarded in its terms. It not only requires that a proper caution be given the prisoner, but, in addition thereto, it must be shown that the confession made is a voluntary statement of the accused. See Code Cr. Proc., art. 790. And, where a question is raised as to the free and voluntary act of a defendant in making the confession, the court will not only look to the language used at the time, but to all the surrounding circumstances, in order to determine whether or not the confession is the voluntary act of the accused. In *Thomas v. State*, 35 Tex. Crim. R. 179, 32 S. W. Rep. 772, the court used this language: "The burden is on the prosecuting power to prove that the confession was voluntary. A confession, especially an affirmative one, appearing to have been made with no expectation of its bringing good or averting evil, is termed 'voluntary' (1 Bish. New Cr. Law, § 1223); the real question being, in every case, whether or not the confessing mind was influenced in a way to create doubt of the truth of the confession. The

burden being on the State, the doubt must be excluded. An involuntary confession, uttered to bring temporal good or avert temporal evil, even when the contemplated benefit is small, will be rejected. The circumstances under which the confession was made are of very great importance. They must be looked to in all cases, and when this is done, and there is nothing pointing to the motive prompting the confession, it will be received. Now, whether there is an express or implied promise to aid the suspected person, or a threat of temporal injury, or whether the suspected person is told that it would be better for him to confess, etc., does not always solve the question. It is true that the inducement under which the confession was uttered is of prime importance, but not always decisive. The inducement and the surrounding circumstances decide the question. The inducement may not be sufficient to show the motive for the confession, but, when read in the light of the surrounding circumstances attending it, may be ample proof to create doubt of the truth of the confession. The judge should closely scrutinize these circumstances in connection with the inducement, and decide the question, and, if nothing pointing to the motive prompting it appears, he should receive it, and over this sort of question the court has a wide discretion." And see *Searcy v. State*, 28 Tex. App. 513, 13 S. W. Rep. 782.

It occurs to us that the environment here shown, in connection with this confession, is, at least, suggestive that same was not the free and voluntary act of the accused, but was superinduced by the conduct of officers who, to use their own language, "knew he was guilty," and determined to make him confess, and unquestionably employed means which we do not believe were in keeping with the spirit of our statute on the subject. While it is desirable to detect and punish crime, yet the safeguards thrown around the citizen should always be observed, especially by those who are in authority. We make these observations in view of another trial, and, inasmuch as the admission of this character of testimony is largely within the discretion of the trial judge, we would suggest the necessity, if any controversy is made in a subsequent trial as to the admission of said confession on the ground that it was not freely and voluntarily made, that the court give the jury a charge on this sub-

ject, which was not done in this case, though a charge on this subject was asked, and a bill of exceptions duly reserved to its refusal.

What we have said heretofore disposes of the other bills of exception relating to the testimony of Geehan and Chubb on the subject of confessions. As to whether or not the confessions to these witnesses were made proximate in point of time in connection with the warning given by the chief of police, we think this sufficiently appears. See *Barth v. State*, 39 Tex. Crim. R. 38, 16 S. W. Rep. 228.

We do not think the testimony of Neimeyer that Richardson, Simonton, and Ricker did not work for him in or about the Mascot Theater, in August, 1897, was admissible. The matter embraced in this testimony might concern the application for continuance, but was not competent on the trial.

As to the letter offered by appellant in evidence as presented in bill of exceptions, we do not think there was error in the refusal of the court to admit the same. For the errors discussed the judgment is reversed, and the cause remanded.

DAVIDSON, P. J., absent.

LUTTRELL V. STATE.

40 Tex. Crim. Rep. 651—51 S. W. Rep. 930.

Decided June 7, 1899.

CHANGE OF VENUE: *Res judicata*—*Estoppel*—*Hearsay evidence*—*Offering to bribe witness*—*Impeachment*, etc.

1. Records for appellate review should be condensed; uncontroverted and conceded matters to be so stated; evidence as to material matters need not be *verbatim*; immaterial matters may be omitted.
2. A change of venue, because of prejudice of the inhabitants, having once been granted, and the case removed to another county and there dismissed by the State because of inability to obtain evidence, is not *res judicata*, and does not of itself entitle defendant to a change of venue on an indictment found several years after in the original county. The local prejudice in the meantime may have subsided.

3. A defendant is not estopped from making an application for a change of venue because at a prior term he had agreed not to do so if granted a continuance.
4. A motion for continuance should show diligence.
5. It is error to permit a witness to state what he has been told as to actions and inquiries by unknown persons.
6. It is error to permit a witness to state that the defendant's counsel had offered to bribe him to leave the county, there being no proof that defendant authorized such conduct.
7. Evidence that a witness has been charged with and is guilty of theft may be rebutted by proof of general good reputation for truth.
8. It was error to allow the State to prove that a town marshal who was friendly to the defendant arrested one of the State's witnesses the day before he testified.

(Several minor points, on evidence not appearing in the opinion, are omitted from this syllabus, but reviewed in the notes.—
J. F. G.)

Appeal from the District Court of Hunt County; Hon. Howard Templeton, Judge.

Louis Luttrell, being convicted of murder in the first degree, appeals. Reversed.

R. L. Porter, S. D. Stinson, W. C. Jones, John Wynne, and Tom C. Thornton, for the appellant.

W. W. Walling and Mann Trice, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life, and he appeals.

The case was filed at the Dallas branch of this court on October 1, 1897, and was submitted on the 20th of April, 1898, at the Austin term. The record is written with a pen, and contains 436 pages; 215 pages thereof being the statement of facts. This record should have been condensed into not exceeding 200 pages; 50 pages of which would have been sufficient for the statement of facts, showing every essential feature of the case to be passed on by this court. We consider it a just subject of criticism that this court has, by this method of practice, been compelled to go through much unnecessary matter, consuming time that should have been devoted to other subjects. It serves but very

little purpose in making a statement of facts to embody every word and sentence each witness may have uttered on the stand. All that we desire is a proper presentation in the statement of facts of the salient features of the case; and, where witnesses agree on any given point, it would be a very easy matter to state what one witness testified on the question, and then state that others, naming them, agree with such witness. If a fact is not traversed, or is conceded, such should be stated; and where witnesses testify on immaterial points, not important to be considered in any bill of exceptions or charge of the court, such might be well omitted. Of course, this does not apply to cases in which it is insisted that the evidence does not support the verdict. In all such cases the record should be full. We make these remarks because the record is unnecessarily large and unwieldy. But these observations apply equally in many cases that come to this court, and we may be compelled in self-defense, when such records come up, to adopt a rule requiring the parties to restate and condense the record.

On a night in September, 1893, one Ed Doggett (a young blacksmith, about twenty years of age), on his way from the business part of the city of Greenville to his home, a short distance from the public square, was shot and killed on one of the public streets of said city, the slayers evidently being concealed in a lumber yard fronting on Stonewall street. At the January term, 1894, the grand jury of Hunt county returned an indictment against defendant and one John English for the murder. The venue in the case was subsequently changed to Collin county on the ground of the existence of prejudice against appellant in Hunt county. The case pended there for several terms of court, and was eventually dismissed on the part of the State, because of its inability to procure testimony to secure the conviction of appellant. Subsequent to this the State discovered other testimony, and the parties were again indicted in Hunt county, on January 30, 1897. At the following July term the case was called for trial. A trial was had, which resulted in the conviction of appellant. On the trial the State offered the positive testimony of an eyewitness to the homicide, and this evidence was strongly re-enforced by circumstances testified to by other witnesses. The motive assigned by the State for the homicide

was to the effect that appellant and John English, a short time prior to the killing, attempted to rob the First National Bank of Greenville, and that deceased was either cognizant of same, or had knowledge of some fact in connection therewith that would lead to the identity of Luttrell and English as the guilty parties; and that on said account appellant and his co-defendant conspired together, and in pursuance thereof shot and killed deceased. Defendant entered a plea of not guilty, and relied on the weakness of the State's case, and also on the plea of *alibi*. On the trial, appellant filed a motion to change the venue of the case on the ground of prejudice against him, and on the ground that there was a secret formidable combination against him; and in this connection he also insisted that, the court having formerly changed the venue on a previous indictment to Collin county, the question of a change of venue was *res adjudicata*, and that it was the duty of the court to recognize this, and change the venue of the case. With reference to the latter proposition we have this to say: The former change of venue, made in 1894, of an indictment and case then pending against appellant in Hunt county, on the ground of prejudice then existing against him, could not be an adjudication of the question on the new indictment for the same transaction (the old one having been dismissed), and presented in the district court of Hunt county in 1897, three years later. It was a new indictment, presented long subsequent to the change in the former case, and under new conditions. The court in such case might take cognizance of the former change, and it might afford some evidence of the existence of prejudice formerly; but it could not be considered *res adjudicata* as to the then existence of prejudice in Hunt county. The court did not err in overruling the application on this ground. The State controverted the appellant's motion for a change of venue on the ground of prejudice and formidable combination, and in connection therewith the court explained that the parties at a former term of the court (defendant being present) had agreed that the court would authorize a continuance of the cause at that term if they would not make a motion for a change of venue at the succeeding term of the court. This was claimed to be an estoppel on appellant, but we cannot so consider it. On the motion the court heard

testimony *pro* and *con*, and we are not prepared to say that the court abused its discretion in refusing to change the venue.

Appellant made a motion for the continuance of said cause. Clearly, appellant was lacking in diligence, and on this ground the court was justified in overruling the motion.

Appellant objected to the testimony of the witness Jack Williams to the effect that Neal Fitts sent for him one night to help catch a horse out on the prairie, and that Will Fitts and a negro told him that a couple of men had ridden up to the lot, and put guns in their faces, and asked where he (witness) was. This testimony was hearsay, and its relevancy was not shown. We do not think it was admissible. The State was permitted to show by Jack Williams (who was an important witness in matters pertinent to the homicide and the connection of appellant therewith) that P. C. Arnold, an attorney for defendant, attempted to bribe him (witness) to leave the country. Defendant objected to this testimony—First, because it was hearsay; and, second, because it was calculated to unduly prejudice the action of the jury against defendant. These objections were overruled, and the court, in approving the bill, states that it was shown that Arnold was at the time Luttrell's attorney, and was acting as such in the transaction. If appellant was shown to have been connected with or had authorized the action of Arnold, said testimony would not only have been admissible, but would have been very damaging to appellant. But aside from the fact that he was the attorney of appellant, there is absolutely no testimony tending to show that he was authorized by appellant to bribe, or offer to bribe, said witness to leave; and we apprehend that it will not be seriously contended that authority to bribe a witness comes within the scope of an attorney's employment to assist in the defense of the case. In the absence of some testimony or statement in the bill of exceptions showing some authority on the part of defendant's counsel to bribe a witness, it cannot be presumed that such authority was given. However beneficial the absence of a witness may be to a defendant in any given case, in the absence of some proof of authority, any attempt on the part of counsel to get rid of a witness must be attributed as of his own motion; yet it cannot be gainsaid that such testimony coming before a jury must necessarily be fraught

with injury to an appellant on trial. In the absence of proof of authority, the jury would nevertheless be apt to believe that the lawyer did not act on his own responsibility, but that there must have been some suggestion from the defendant, and so, without proof, visit upon defendant the sin of his counsel. This is not a new question in this court, but it has always been held, before testimony of this character is admissible in any case, there must be proof of some connection or of some authority conferred by defendant; otherwise, the testimony as to such defendant is purely hearsay. *Favors v. State*, 20 Tex. Crim. App. 156; *Barbee v. State*, 23 Tex. Crim. App. 199, 4 S. W. Rep. 584; *Nalley v. State*, 28 Tex. Crim. App. 387, 13 S. W. Rep. 670. The State introduced evidence to show that the State's witness Melton had a good reputation for truth in the community in which he lived. This was objected to by defendant on the ground that no attempt had been made to impeach said witness. The court, however, certifies that said testimony was offered after defendant had tried to impeach Melton, not only by contradicting his evidence, but by introducing in evidence proof that he had been charged to be, and was in fact, guilty of theft, etc. It seems permissible to sustain a witness who has been assaulted by proof showing that he has been in jail, or been charged with other criminal offenses by evidence supporting the general reputation for truth of such witness. *Farmer v. State*, 35 Tex. Crim. R. 270, 33 S. W. Rep. 232; Wharton, Ev. § 491. There was no error in the action of the court permitting the witness Barker to refresh his recollection by the testimony taken down by him in the grand-jury room. There was no error in the court permitting the introduction of the State's witness J. W. McGinnis when admitted, nor permitting his testimony as to conversations with defendant. It was not necessary to lay a predicate, as for the impeachment of defendant, as to these matters. It was original evidence against him. We do not believe it was permissible to allow the State to prove by the witness J. W. McGinnis that the city marshal of Greenville, W. R. Velvin, had arrested him on the previous day. No connection whatever is shown between witness' arrest and any issue presented in the case against appellant. But, inasmuch as there was testimony tending to show that Velvin was a friend

of defendant, it was calculated to suggest that the arrest of McGinnis, whose testimony was material, and appears to have been recently discovered, was instigated by some animus on the part of Velvin against him because he was a witness against defendant.

In all, twenty-nine bills of exception were reserved, but we have discussed all that we regard as material as involving questions likely to occur on another trial. We would here, however, suggest that a number of bills are taken to the argument of the district attorney. Some of the language attributed to him appears to be outside of the record, and of a character calculated to inflame the minds of the jury unduly. It is suggested, also, in some of the bills, that during the time these remarks were being made the court was off the bench (perhaps in an adjoining room), and separated by the crowd from the jury and counsel. The court, however, does not appear to agree to this latter suggestion. Of course, we take it that in the proper administration of law the judge ought to be and is present during the entire trial. As to the remarks of counsel, we are not prepared to say that we would reverse the case on that ground. As stated, however, some of the remarks were of an intemperate character, and should have been promptly restrained by the court. On another trial we take it that such conduct will be avoided. On account of the admission by the court of the illegal testimony before discussed, the judgment is reversed and the cause remanded.

NOTES (by J. F. G.).—That portion of the opinion which says that the witness Barker was authorized to refresh his recollection from the testimony taken down in the grand jury room, and that there was no error in permitting the witness McGinnis to testify to certain conversations, should not be accepted as authority, because it does not appear to what extent the witness Barker refreshed his memory, nor does the opinion give the substance of the conversation related by McGinnis. Matters of that nature depend upon the particular circumstances of the case; for example, the witness Barker might have refreshed his recollection simply as to a date, or as to some immaterial matter.

New indictment after change of venue.—The first indictment being dismissed, no new indictment could be had, except in the county where the offense is alleged to have been committed; but in *Smith v. Commonwealth*, 95 Ky. 322, 25 S. W. Rep. 106, it was held that, when a change of venue is taken and the indictment is still pending, no new indictment can be had. We here give the opinion in full:

HAZELRIGG, J. On this appeal from a judgment of the Bell circuit court, consigning the appellant to the penitentiary for life for the murder of John McKnight, in Perry county, the following facts appear from the record, upon which the jurisdiction of the trial court is denied: On August 25, 1890, the appellant, with a number of others, was indicted for the murder of John McKnight in the Perry circuit court; and thereupon the attorney for the Commonwealth, under the provisions of an act of the general assembly approved May 26, 1890, giving the Commonwealth the right to change the venue of a case when there existed a state of lawlessness on the part of the friends and sympathizers of the accused preventing a fair trial, filed his written statement, and the cause was transferred to the Clark circuit court. Thereafter the defendant in that indictment, the present appellant, appeared in the Clark court, and executed bond for his appearance there, as required by law. The regularity of this transfer, and the constitutionality of the act under which it was made, were determined by this court in the case of *Com. v. Davidson*, 91 Ky. 162, 15 S. W. Rep. 53; the appellee in that case, Davidson, being one of the defendants in the indictment with Smith, the present appellant. On March 17, 1893, and while the former indictment was still pending and undetermined in the Clark circuit court, the grand jury of Perry county again indicted the appellant, Smith, for the murder of John McKnight, and, notwithstanding his protest against the jurisdiction of the court, made by demurrer, plea of former jeopardy, and his affidavit, and the record showing that the Perry circuit court had been divested of its jurisdiction over the case by the transfer mentioned, the court was about to proceed to a trial of the case, when the appellant procured, by proper steps under the statute, a change of venue to the Bell circuit court. In the latter court the same questions were again raised as to the jurisdiction of the court, and the foregoing facts were shown by copies of the records from the Perry and Clark circuit courts. The court refused to set aside the indictment, overruled the demurrers, general and special, and the objections of the appellant to the jurisdiction, etc., and the case proceeded to trial under the protest of the appellant, who pleaded former jeopardy, and set forth the foregoing facts; and, on the trial, the evidence of the former indictment for the same offense, and the pendency of the same case in Clark, etc., were shown, and the court was asked to instruct the jury to find the defendant not guilty. The court overruled his motions and plea, and instructed the jury that if they believed from the evidence that the defendant had theretofore been acquitted of the offense charged in the indictment by a judgment of the Clark circuit court, and if they further believed from the evidence that said court had jurisdiction of his person and of the offense charged in the indictment, then they should acquit the defendant. And, further, that it was admitted by the Commonwealth, and must be taken as true, that the defendant was the same person who was indicted in the Perry circuit court at its August term, 1890, for the murder of John McKnight and who was then being tried for the murder of the same John McKnight, and that both indictments charged the same offense. The court also gave the usual instructions as to murder, manslaughter, etc.

It appears from the copy of an order of the Clark circuit court, filed by the appellant on his motions in this case, and as evidence on the trial, that the Commonwealth's attorney, in the judicial district embracing Clark county, had filed a written statement on October 4, 1893, upon which the court ordered that the indictment against the defendant Smith—the present appellant—be filed away, with leave to redocket the same upon motion of the Commonwealth's attorney. It is apparent that the finding of the second indictment while the first one remained undisposed of, and all the proceedings thereafter had on it, are quite out of the ordinary. It is clear that, by its transfer of the case to the Clark circuit, the Perry circuit court lost all jurisdiction over the subject-matter of the indictment. The proceedings, therefore, thereafter had on the second indictment, were void for want of jurisdiction in the court in which they were had, and this is true of the attempted trial in the Bell circuit court. On motion of the defendant in the Clark circuit court, the Commonwealth not objecting, the venue might have been changed back to Perry, as decided in *Hourigan v. Commonwealth*, 94 Ky. 520, 23 S. W. Rep. 355, but not otherwise. The so-called trial in Bell was, in legal contemplation, no trial at all, and the same would have been true of every attempted trial in Perry on this second indictment. The Clark circuit had, at the finding of this second indictment, and at the time of the trial in Bell, full and complete jurisdiction of the case, and, upon redocketing it, might yet proceed to try the appellant for the murder of John McKnight.

These principles are fundamental and elementary. It is but just to say that the learned attorney-general, who, while quick enough always zealously to prosecute the just pleas of the State, yet concedes this case to be one "where it is to the interest of the Commonwealth that the law be vindicated by a reversal." The judgment is therefore reversed, with directions to quash the indictment, and discharge the appellant.

SAFFOLD V. STATE.

76 Miss. 253—24 So. Rep. 314.

Decided December 26, 1898.

CHANGE OF VENUE: *Deadly weapon—Ordinary pocket-knife—Instructions regarding self-defense.*

1. Where the defendant is a stranger in the county—and the relatives of the deceased are numerous, prominent, influential and scattered throughout the entire county,—and it appears that there is a general belief that defendant is guilty,—with public feeling so intense against the defendant that the jail had been guarded to prevent mob violence, the defendant is entitled to a change of venue.
2. An instruction that the jury should not give the defendant the benefit of acting from "personal timidity or needless fear" should

be qualified by the statement, "If such personal timidity or needless fear are shown by the evidence beyond a reasonable doubt."

3. It is error for the court to instruct the jury that an ordinary pocket-knife is not a deadly weapon *per se*.
4. Where there is an entire failure to show that the defendant began the difficulty, it is reversible error to instruct the jury that "the right to use a deadly weapon in self-defense is denied to an accused person who was the originator of the difficulty, entered it armed and brought it on intending to use his weapon to overcome his adversary."

Appeal from the Circuit Court of Montgomery County;
Hon. W. F. Stevens, Judge.

Saffold, the appellant, who was indicted for murder, made an application for change of venue, which was denied. One of the jurors on his *voir dire* denied that he was related to the deceased, but he was shown to be related in the fourth or fifth degree. The wife of another juror was related to the deceased.

Saffold, expecting a letter, called for his mail, and was informed by Ingram, the postmaster, that there was nothing for him; but when he called the next day he was handed a letter by some other person in charge of the office. Saffold accused the postmaster of not properly stamping letters on their receipt. A dispute followed, and Ingram approaching and striking at Saffold with his pocket-knife, Saffold was knocked down, and during the melee some one cried out, "Stop, Ingram, for God's sake, stop," and Saffold firing his pistol killed Ingram.

The third instruction for the State was as follows: "While the jury should put themselves in the place of defendant and judge of his acts by the facts and circumstances by which he was surrounded, they should not, however, give him the benefit of personal timidity or needless fear."

The court instructed the jury on behalf of the State, that "an ordinary pocket-knife is not a deadly weapon *per se*."

The fifth instruction for the State was as follows: "The right to use a deadly weapon in self-defense is denied to an accused person who was the originator of the difficulty, entered it armed, and brought it on intending to use his weapon to overcome his adversary."

The defendant, being convicted of manslaughter, appeals.
Reversed.

S. M. & W. C. Meek and T. U. Sisson, for the appellant.
Oral argument by *T. U. Sisson*.

Wiley N. Nash, Atty. Gen., for the State.

WHITFIELD, J., delivered the opinion of the court. Reluctant as we always are to interfere with the exercise of discretion by the lower court, we have been compelled in this case, after the most careful consideration, to hold that the application for a change of venue should have been granted. Twenty-five witnesses, besides the defendant, testified positively that, by reason of "prejudgment of this case, or grudge or ill-will towards the defendant," he could not obtain a fair and impartial trial in the county. Some twenty witnesses were examined by the State; a number of them had formed opinions as to the guilt of the defendant which it would require evidence to remove. Most of the expressions heard by these witnesses were decidedly adverse to the defendant. Defendant was a stranger in the county. Deceased's family connections were numerous, prominent and influential, and scattered over the county, especially the eastern part of the county, where was the largest white element. One of the jurors was, by affinity, related to the deceased in the fourth or fifth degree, and yet seems not to have known it. So intense was the feeling roused against the defendant that mob violence threatened the jail, which had to be guarded. We will not enlarge further. Under this showing the venue should have been changed. *Jamison v. People*, 145 Ill. 357. See cases cited in notes to 3 Am. & Eng. Enc. Law (1st ed.), 97; *Johnson v. Com.*, 82 Ky. 116.

The third instruction for the State is correct enough as an abstract proposition of law, but, as applied to the concrete case made by the testimony, should have added at the close, "if such personal timidity or needless fears are shown by the evidence beyond a reasonable doubt." The instruction that an ordinary pocket-knife is not *per se* a deadly weapon, as a matter of law, is one we are not prepared to approve. What is an ordinary pocket-knife? The knife in this case was a four-bladed knife, about three inches long closed, with a buck-horn handle. Dr. Ward testified there were three parallel cuts on Saffold's face, apparently made "with a dull edge." It is proper to have the

jury to say, as a matter of fact, whether a weapon is a deadly weapon, and the court properly charged the jury for the defendant to this effect. Indeed, the series of charges given for the defendant in this case were abundantly liberal to the defendant, and were drawn with consummate skill, and, whilst pointing out these errors in the two charges named, we would not for these errors reverse the judgment. But the fifth charge for the State, whilst announcing a correct abstract proposition of law, is fatally erroneous as applied to the case made by the proof. There is an entire failure to show, in a proper sense, that Saffold began the difficulty. We forbear to comment on the testimony, except as necessary in passing upon these charges.

Judgment reversed, verdict set aside, and cause remanded for a new trial.

NOTE (by J. F. G.).—In *State v. Billings*, 77 Iowa, 417, 8 Am. Crim. Rep. 329, a conviction for murder in the second degree was reversed, because of error in the court below in overruling a motion for a change of venue. The defendant sought not only a change of venue from his own county, but objected to another adjoining county. His application was supported by the affidavits of forty or fifty persons, alleging that public sentiment was against the defendant, etc., and that in some instances talk of lynching was indulged in. There was also evidence that various persons had expressed their belief that there should be a change of venue; but that they declined to assign it for business and other reasons and also declined to make affidavits. About eight hundred residents of three counties made counter affidavits, the affiants claiming to be acquainted with the feelings and sentiments existing, and that no such prejudice would exist as would prevent a fair and impartial trial; but did not controvert the fact stated in the affidavits supporting the application for change, and did not deny any of the statements as to excitement and prejudice. The court held that the counter affidavits were insufficient. The case was reversed, and the venue changed to another county, and again a verdict of murder in the second degree was rendered; but this the Supreme Court reversed, and ordered that the defendant be discharged, because the evidence strongly indicated that the deceased had committed suicide. The judge writing the opinion said that such was the opinion of the judges at the previous hearing, but in that instance they simply granted the new trial that the case might be re-submitted to a jury; but as this theory was more clearly demonstrated at the second trial, the defendant should be discharged.

The writer bears in mind a burglary case tried at West Union, Iowa, about thirty years ago, in which the defendant had often been accused of crime, but was generally very successful in his defenses; the previous cases making heavy costs to the county. The defendant made an

application for a change of venue, obtaining the signatures of a few persons to the affidavit. The prosecution sent a notary public through the town with a counter affidavit for signatures, and obtained so many that the application was denied and the defendant was convicted. In the presence of the writer, one of the well-known business men of that town when he signed and swore to the affidavit stated that he believed the defendant could obtain a fair trial; because he believed that upon a fair trial the defendant would be convicted. This illustration is given simply to show the unreliability of affidavits of this nature when the facts upon which the party grounds his belief are not stated.

STATE V. MYLOD.

20 R. I. 632—40 Atl. Rep. 753.

Decided July 18, 1898.

CHRISTIAN SCIENCE: *Constitutional questions not involved—Construction of statute regulating the practice of medicine and surgery—Benefit of reasonable doubt as to matters of law.*

1. The question as to whether or not an act of the legislature is in violation of the constitution will not be considered when the evidence does not show a violation of the provisions of the act.
2. While the words of a statute "are not to be restricted in meaning within the narrowest limits, neither are they to be extended beyond their common interpretation; and if there is a reasonable doubt as to whether the acts done are within the meaning of the statute, the party accused of its violation is entitled to the benefit of that doubt."
3. The practice of Christian Science is not controlled by the statute relating to the practice of medicine and surgery.

Walter E. Mylod, being charged by complaint with practicing medicine and surgery for reward, without registration and license, the matter was certified to the Supreme Court by a district court, upon a constitutional question.

Charles F. Stearns, Asst. Atty. Gen., for the State.
George H. Littlefield, for the defendant.

BOSWORTH, J. The defendant was adjudged probably guilty in the district court of the Sixth judicial district upon complaint of Gardner T. Swarts, secretary of the State board of health. Said complaint, which was made under chapter 165,

Gen. Laws R. I., alleges that the defendant, at Providence, on the 26th day of November, 1897, "did then and there practice medicine and surgery for reward and compensation, without lawful license, certificate, and authority, and not being then and there duly registered according to law."

The defendant, upon arraignment, pleaded not guilty, and subsequently, and before judgment, raised a question of the constitutionality of said chapter 165, which question, in accordance with the provisions of chapter 250, Gen. Laws R. I., was certified and transmitted to the appellate division of the Supreme Court for decision.

Gen. Laws R. I., ch. 165, provides for the registration of physicians, and its object is to regulate the practice of medicine and surgery. Under this chapter, authority to practice medicine and surgery is through a certificate issued by the State board of health, and said board, upon application, and without discrimination against any particular school or system of medicine, is required to issue such certificate to any reputable physician practicing, or desiring to begin the practice of, medicine or surgery in this State, who possesses certain specified qualifications.

Section 2 of said chapter, in part, is as follows:

"Sec. 2. It shall be unlawful for any person to practice medicine or surgery in any of its branches, within the limits of this State, who has not exhibited and registered in the city or town clerk's office of the city or town in which he or she resides, his or her authority for so practicing medicine as herein provided, together with his or her age, address, place of birth, and the school or system to which he or she proposes to belong."

Section 8 of said chapter is as follows:

"Sec. 8. Any person living in this State or any person coming into this State, who shall practice medicine or surgery, or attempt to practice medicine or surgery in any of its branches, or who shall perform or attempt to perform any surgical operation for or upon any person within the limits of this State for reward or compensation, in violation of the provisions of this chapter, shall upon conviction thereof be fined fifty dollars, and upon each and every subsequent conviction shall be fined one hundred dollars and imprisoned thirty days, or either or both,

in the discretion of the court; and in no case, where any provision of this chapter has been violated, shall the person so violating be entitled to receive compensation for services rendered. To open an office for such purpose, or to announce to the public in any other way a readiness to practice medicine or surgery in this State, shall be to engage in the practice of medicine within the meaning of this chapter."

For the State, Everett Hall testified, substantially, that he called upon the defendant at his residence, and asked to be cured of malaria; that the defendant said he was Dr. Mylod; that the defendant sat looking at the floor, with his eyes shaded, as if engaged in silent prayer, for about ten minutes, and then, looking up, said, "I guess you'll feel better;" that defendant gave him a book entitled "A Defense of Christian Science;" that he gave defendant one dollar; that defendant did not recommend nor administer any drug or medicine, nor take his pulse or temperature, nor do any of the things usually done by physicians.

Clarence Vaughn, in behalf of the State, testified that he called upon the defendant at his residence on two occasions, and requested to be cured of the grippe; that he gave defendant one dollar each visit; that defendant said he was Dr. Mylod; that defendant gave him a card, stating the defendant's office hours, and describing defendant as a Christian Scientist, but not in any way referring to defendant as a physician; that defendant did not take his pulse or temperature, nor do any of the other things that physicians do in treating disease, but seemed to be sitting in silent prayer; that defendant gave him a book entitled "An Historical Sketch of Metaphysical Healing;" that defendant told him to look, not on the dark side of things, but on the bright side, and to think of God, and it would do him good, since thought governs all things.

Dr. Gardner T. Swarts, secretary of the State board of health, testified that the defendant is not a registered physician, that said defendant does not have authority to practice medicine in Rhode Island, and that physicians often cure disease without the use of drugs or medicine.

For the defense, the charter of the Providence Church of Christ, Scientist, was introduced in evidence, and the defend-

ant testified, substantially, that he is the president and first reader or pastor of said church; that said church has been organized and has held regular religious services for seven years; that said church belongs to the sect known as Christian Scientists, in whose belief God and Jesus Christ and the Bible hold a supreme place; that the principal distinguishing difference between Christian Scientists and other sects consists in the belief of the former regarding disease, which they believe can be reduced to a minimum through the power of prayer; that the public religious services of said church consist of silent prayer, music, reading of the Scriptures and of extracts from "Science and Health," by Mary G. Baker Eddy; that he, beyond a greater realization of truth which his longer study of Christian Science may have given him, professed to have no greater power over illness than that possessed by any member of his church; that he did not tell the witnesses Hall and Vaughn that he could cure them, nor did he call himself a doctor; that he did not attempt to cure them by means of any power of his own; that he assured them that it is God alone who heals, acting through the human mind; that all he did was to engage in silent prayer for them, and to endeavor to turn their thoughts to God and towards the attainment of physical perfection; that the efforts made for them were precisely the same in character as those which he makes for his congregation at public services of his church; that he does not practice medicine, nor attempt to cure disease; that he has no knowledge of medicine or surgery; that, as a Christian Scientist, he never recommended to any one a course of physical treatment; that he has only the method of prayer and effort to encourage hopefulness, for all who come to him in public or private, and whatever disease they imagine they have; and that his ministrations often can be and are rendered as effectively in the absence as in the presence of the beneficiary.

Other witnesses were called, but there was no material variance in the testimony except that the witnesses Hall and Vaughn testified that the defendant said he was Dr. Mylod, which testimony was contradicted by the defendant.

The constitutional question raised by the defendant is that under sec. 3, art. 1, Const. R. I., which secures to him religious

freedom, he had a right to perform the acts shown by the testimony to have been performed, and that, therefore, said ch. 165, Gen. Laws R. I., under which said complaint was made, is unconstitutional if, and in so far as, it provides a penalty for the performance of said acts.

This question, properly, cannot be considered by the court unless said chapter 165 is sufficiently broad to include within its prohibitive provisions the acts of the defendant, for the defendant cannot question the constitutionality of said chapter unless his rights would be affected by its enforcement. *State v. Snow*, 3 R. I. 64.

There is no testimony tending to show that the defendant practiced or attempted to practice surgery, or that he made any diagnosis or examination to ascertain whether the witnesses Hall and Vaughn were suffering from disease, or that he administered or prescribed any drug, medicine, or remedy, or that he claimed any knowledge of disease, or the proper remedies therefor.

Upon the testimony, the only claim that can be made by the State is that upon a card handed to one of the witnesses appeared the name and office hours of the defendant; that the defendant said he was Dr. Mylod; that he offered silent prayer for the witnesses Hall and Vaughn, who claimed to be suffering from disease; that he gave said witnesses each a book in which, presumably, the principles of Christian Science were taught, explained, and defended; that he told the witness Vaughn, substantially, to look on the bright side of things, and think of God, and it would do him good; and that he accepted compensation for his services.

Did these acts of the defendant constitute the practice of medicine, in violation of ch. 165, Gen. Laws R. I.?

It is the duty of the court to give effect to the intention of the lawmaking power as embodied in the statutes. The legislature is presumed to mean what it has plainly expressed, and, when it has so expressed its meaning, construction is excluded. It is only when the meaning of a statute is obscure, or the words employed are of doubtful meaning, that, in order to give effect to the legislative intention, the duty of construction arises. In the construction of penal statutes a well-established rule is that

words and phrases must be taken in their ordinary acceptation and popular meaning, unless a contrary intent appears. While the words of such statutes are not to be restricted in meaning within the narrowest limits, neither are they to be extended beyond their common interpretation; and, if there is a reasonable doubt as to whether the acts done are within the meaning of the statute, the party accused of its violation is entitled to the benefit of that doubt. Endl. Interp. St., §§ 329, 330.

It follows, therefore, that the acts complained of are excluded from the operation of said chapter 165 unless the words "practice of medicine," taken in their ordinary or popular meaning, include them, or unless it appears from said chapter that the legislative intent was to give to said words a meaning broader and more inclusive than the popular one.

Medicine, in the popular sense, is a remedial substance. The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain. It rests largely in the sciences of anatomy, physiology, and hygiene. It requires a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations; and, further, it requires a knowledge of drugs, their preparation and action. Popularly, it consists in the discovery of the cause and nature of disease and the administration of remedies or the prescribing of treatment therefor.

Prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense.

The State, however, contends that said chapter 165, taken as a whole, indicates a legislative intention to give to the words "practice of medicine" a meaning broader than the popular one. In support of this contention it calls attention to the provision contained in section 8 of said chapter that "to open an office for such purpose [that is, for the practice of medicine or surgery], or to announce to the public in any other way a readiness to practice medicine or surgery in this State, shall be to engage in the practice of medicine within the meaning of this chapter."

In view of this provision, the State contends that to practice medicine it is not necessary to use internal or other remedies, nor to make diagnoses, nor to have a patient, but that the opening of an office for the practice of medicine, or the announcement of a readiness to engage in such practice, constitutes a practice of medicine; and therefore, as the statute applies not only to those who actually practice, but also to those who announce in any way a readiness to practice, the State contends that the legislature intended to give a broader than the generally accepted meaning to the words "practice of medicine."

We are unable to agree with this contention. Without passing upon the provision referred to, and whatever its significance, it certainly cannot be construed to broaden, in a general sense, the meaning of the words "practice of medicine." The most that can be claimed for it is that it operates to broaden the offense created by said chapter 165, so that the attempt or the announcement of a readiness to practice medicine becomes equivalent to the actual practice.

The State further calls attention, in support of its contention, to section 6 of said chapter, which provides that "nothing in this chapter shall be so construed as to discriminate against any particular school or system of medicine;" and it argues that, as the statutory prohibition relates to the practice of medicine "in any of its branches," and that as certain diseases—such as insanity and nervous prostration—are treated by the so-called "regular school" without the use of drugs, and that as all schools recognize the study of mental conditions as affecting bodily health as forming a distinct branch of medicine, the legislative intention to give to the words "practice of medicine" a construction sufficiently broad to include the practice of Christian Science is clearly manifest.

The words of the provision against discrimination, like the words "practice of medicine," must be taken in their ordinary sense and meaning. It is a matter of common knowledge that among medical men there are defined differences regarding the treatment of disease. These differences have resulted in different schools or systems of medicine. A recognition of the existence of such differences, however, does not broaden the meaning of the words "practice of medicine" to include the practice

of that which, in the popular sense, is not a practice of medicine. Neither does the statutory reference to the practice of medicine "in any of its branches" affect the meaning of the words in question. While it is true that the study and treatment of mental disease constitute one of the departments or branches of medicine in which the influence of the mind over the body is recognized, yet mere words of encouragement, prayer for divine assistance, or the teaching of Christian Science as testified, in the opinion of the court, does not constitute the practice of medicine in either of its branches, in the statutory or popular sense.

To give to the words "practice of medicine" the construction claimed for them by the State, in the opinion of the court, would lead to unintended results. The testimony shows that Christian Scientists are a recognized sect or school. They hold common beliefs, accept the same teachings, recognize as true the same theories and principles. If the practice of Christian Science is the practice of medicine, Christian Science is a school or system of medicine, and is entitled to recognition by the State board of health to the same extent as other schools or systems of medicine. Under said chapter 165 it cannot be discriminated against, and its members are entitled to certificates to practice medicine, provided they possess the statutory qualifications. The statute, in conferring upon the State board of health authority to pass upon the qualification of applicants for such certificates, does not confer upon said board arbitrary power. The board cannot determine which school or system of medicine, in its theories and practices, is right; it can only determine whether the applicant possesses the statutory qualification to practice in accordance with the recognized theories of a particular school or system. It would be absurd to hold that under said chapter 165, which provides against discrimination, the requirements necessary to entitle an applicant to a certificate were such that the members of a particular school or system could not comply with them, thus adopting a construction which would operate not as a discrimination only, but as a prohibition. On the other hand, to hold that a person who does not know or pretend to know anything about disease, or about the method of ascertaining the presence or the nature of disease, or about

the nature, preparation, or use of drugs or remedies, and who never administers them, may obtain a certificate to practice medicine, is to hold that the operation of the statute is to defeat the beneficial purposes for which it was enacted.

The cases cited by the State do not sustain its contention. In *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. Rep. 228, the plaintiff brought suit against the defendant, who was a clairvoyant physician, to recover damages for alleged unskillful treatment. In testimony it appeared that the defendant held himself out as a healer of disease, and accepted compensation; that he determined the nature of the disease for which he treated the plaintiff, and the character of the remedies he administered, while in a mesmeric state or trance condition. The court held that the defendant was bound to exercise reasonable skill, and that the knowledge of the plaintiff of his methods was no defense to the action.

In *Bibber v. Simpson*, 59 Me. 181, which was an action brought to recover compensation for services, the opinion of the court is as follows: "The services rendered were medical in their character. True, the plaintiff does not call herself a physician, but she visits her sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed by her most appropriate. Whether the plaintiff calls herself a medical clairvoyant, or a clairvoyant physician, or a clear-seeing physician, matters little. Assuredly, such services as the plaintiff claims to have rendered purport to be, and are to be deemed, medical, and are within the clear and obvious meaning of Rev. St. 1871, ch. 13, § 3, which provides that 'no person except a physician or surgeon, who commenced prior to February 16, 1831, or has received a medical degree at a public medical institution in the United States, or a license from the Maine Medical Association, shall recover any compensation for medical or surgical services, unless previous to such services he had obtained a certificate of good moral character from the municipal officers of the town where he then resided.' The plaintiff has not brought herself within the provisions of this section and cannot maintain this action."

In *Wheeler v. Sawyer* (Me., 1888), 15 Atl. Rep. 67, the plaintiff, a Christian Scientist, brought suit to recover for serv-

ices. Sec. 9, ch. 13, Rev. St. 1883, is the same as sec. 3, ch. 13, Rev. St. 1871, except that it does not relate to physicians and surgeons practicing prior to February 16, 1831. The plaintiff had received the certificate of good moral character required by statute. The court said: "We are not required here to investigate Christian Science. The defendant's intestate chose that treatment. There is nothing unlawful or immoral in such a contract. Its wisdom or folly is for the parties, not for the court, to determine."

In *State v. Buswell*, 40 Neb. 158, 58 N. W. Rep. 728, the defendant was indicted for the unlawful practice of medicine. In Nebraska (Laws 1891, ch. 35), the practice of medicine, surgery, and obstetrics is prohibited except by persons possessing certain qualifications. Section 17 of said chapter 35, in part, is as follows: "Sec. 17. Any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another." The defendant was a Christian Scientist, and the evidence against him upon which the State relied was similar in character to that in the case under consideration. The trial court instructed the jury that, in order to convict the defendant, they must find that the defendant had practiced medicine, surgery, or obstetrics, as those terms are usually and generally understood, and the State excepted.

The Supreme Court, in sustaining the exception, uses the following language: "Governed by the instruction, the jury could not do otherwise than to acquit, for there was no proof to meet its requirements."

Again: "The statute does not merely give a new definition to language having already a given and fixed meaning. It rather creates a new class of offenses, in clear and unambiguous language, which should be interpreted and enforced according to its terms."

Again: "Under the indictment the sole question presented upon the evidence was whether or not the defendant, within the time charged, had operated on, or professed to heal or prescribe for, or otherwise treated, any physical or mental ailment of another."

The decision of the Nebraska court, therefore, is that, while the practice of Christian Science is not a practice of medicine as those terms usually and generally are understood, yet that, under the section above quoted, the practice of Christian Science, being a treatment for physical or mental ailments, is a violation of the law.

In Missouri the statute requires that before a person may lawfully practice medicine or surgery he must file a copy of his diploma with the clerk of the county court, and it further provides (Rev. St., § 6304) that any person, not qualified, who shall practice medicine or surgery, shall not be permitted to recover compensation for services rendered "as any such physician or surgeon."

In *Davidson v. Bohlman*, 37 Mo. App. 576, the plaintiff having brought suit to recover for services, the question raised was whether the services were performed by the plaintiff as a physician. The plaintiff had practiced medicine lawfully for nearly thirty years, first as an allopathic physician and later as an electric physician. He had a diploma from an electric medical college, but had failed to file a copy of it as required by law. The services for which he claimed compensation consisted of electric treatment. The bill for services furnished the defendant described the plaintiff as "Dr. T. P. Davidson," and the plaintiff called a medical practitioner to testify to the value of the services in question. The court of appeals, upon the testimony, held that the services were performed by the plaintiff as a physician, and that, not being qualified to practice, he could not recover.

The assumption of the title of "doctor," if defendant assumed such title, was not unlawful. Chapter 165 does not, in terms, prohibit the use of the word "doctor" by any person, whatever his business or profession may be. Its use is entirely immaterial in any case, unless under such conditions or circumstances, or in such connection, that it may serve as an announcement or indication of a readiness to engage in the practice of medicine or surgery.

The object of the statute in question is to secure the safety and protect the health of the public. It is based upon the assumption that to allow incompetent persons to determine the

nature of disease, and to prescribe remedies therefor, would result in injury and loss of life. To protect the public, not from theories, but from the acts of incompetent persons, the legislature has prescribed the qualifications of those who may be entitled to perform the important duties of medical practitioners. The statute is not for the purpose of compelling persons suffering from disease to resort to remedies, but is designed to secure to those desiring remedies competent physicians to prepare and administer them. See *Smith v. Lane*, 24 Hun, 632.

The opinion of the court is that the words "practice of medicine," as used in Gen. Laws R. I., ch. 165, must be construed to relate to the practice of medicine as ordinarily and popularly understood, and that the acts of the defendant do not constitute a violation of said chapter. The court therefore cannot properly pass upon the constitutional question raised, for the rights of the defendant would not be affected by any conclusion at which the court might arrive.

NOTES (by J. F. G.).—*If the trial court had no jurisdiction to hear and determine the subject-matter, an appellate review of the evidence is superficial.*—In a prosecution for a supposed criminal offense, commenced by a complaint, the trial court obtained the jurisdiction, if any, from the facts charged in the complaint. *Moore v. Votts*, 1 Ill. 18; *Housh v. People*, 75 Ill. 487; *Sarah Way's Case*, 41 Mich. 299, 1 N. W. Rep. 1021; *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. Rep. 619; *Armstrong v. Vandevaner*, 21 Wash. 682, 59 Pac. Rep. 510; *Ex parte Lane*, 34 Fed. Rep. 34.

The complaint in the case under consideration does not set out the acts constituting the supposed offense (*State v. Fisk*, 18 R. I. 416, 23 Atl. Rep. 348; *State v. Murray*, 41 Iowa, 580; *Glenn & Torrey v. People*, 17 Ill. 105; *Sarah Way's Case*, *supra*; *Vandever v. State*, 11 Am. Crim. Rep. 355; notes, p. 369; but if the charge is sufficient to bring the matter within the terms of a void act of the legislature, and show a condition in which the sovereign power of the constitution shields the accused from prosecution, the entire proceeding, being without authority of law, is *coram non judice*. In such case there is no basis for legitimate evidence to be considered by a court whose charter is the constitution. "The constitution can establish no tribunal with power to abolish that which gave and continues such tribunal in existence." *Phoebe v. Jay*, 1 Ill. 207.

The court, attracted by the novelty of a proceeding, may have deemed the points passed upon a refreshing relief from the flood of serious matters and perplexing subjects that vexes the judicial mind, and may have acted wisely in not occupying valuable time in solving deeper problems of law; but such fact does not justify the announce-

ment of the fallacious doctrine that, as a general rule, a proceeding *prima facie* void must be recognized as valid until the proofs are submitted sustaining the merits of a case which in its inception has no merit.

SPICER V. COMMONWEALTH.

21 Ky. Law Rep. 528—51 S. W. Rep. 802.

Decided June 15, 1899.

CONFESSIONS: *Statements not amounting to a confession—Instructions thereon.*

On indictment for hog stealing, the fact that several defendants said they found the hog after it had been killed by dogs does not amount to a confession. It was error to refer to the same in an instruction as a confession.

Appeal from the Circuit Court of Breathitt County.

James, Stephen and William Spicer, being convicted of hog stealing, appeal.

E. A. Hurst and *W. H. Blanton*, for the appellants.

W. S. Taylor and *N. H. Thatcher*, for the Commonwealth.

BURNAM, J. This is an appeal from the judgment of the Breathitt circuit court sentencing each of the appellants to the penitentiary for a term of two years for the crime of hog stealing.

It is insisted for the appellants that there is no evidence to support the verdict and judgment, and that the court erred to their prejudice in the instructions given on the trial.

The testimony in the case is meager. John Arrowood testified that in July, 1898, he lost a spotted sow which weighed about 150 pounds, and was worth about \$5; that he received information that a hog had been killed in the road on Lick branch, about one mile from where he lived, and in the neighborhood in which appellants lived; that he went to the place where he had been informed the hog had been killed, and found the head of a hog covered up with leaves, that looked like his, but that he did not know who killed it; that appellants James

Spicer and William Spicer testified on the examining trial that they had found the hog dead just above where they lived, and had skinned it and carried it home; that appellant Stephen Spicer had not been arrested, was not present, and did not testify on the examining trial; and that the head he found in the leaves looked like it had been mashed. Sam Stidham testified he was at the examining trial, and heard Stephen Spicer and James Spicer testify in their own behalf, and that they each stated that they had found the hog, and took it home and ate it. A. D. Strong testified that he found the foot of a hog on the branch a short distance from appellants' field, but that he did not know whose hog it was. George Fields testified that some time in June or July he saw James Spicer and William Spicer go up the creek by his house, and that they informed him that they had learned some dogs had killed a hog upon the creek, and they were going up to see about it; that in an hour or two after they came back down the creek, carrying ten or fifteen pounds of meat apiece, and that Jeff Spicer was with them, but that Stephen Spicer was not along; that they said they had found the hog where the dogs had killed it, and had skinned it and were carrying it home, and said that they would pay the owner—whoever he was—for the hog. George Deaton testified that he was present at the examining trial, and heard James Spicer and Stephen Spicer testify in their own behalf, and that they testified that they had found the hog, took it home, and ate it. This was all the testimony for the Commonwealth.

Appellants James and William Spicer testified that they had received information that their dogs had killed a hog upon the branch above their field, and, in company with their brother Jeff Spicer, they went up to where they had learned the dogs had killed the hog, and found the carcass of a hog which had been killed a short time before by dogs, and that they concluded to skin it and take it home, and, if the owner came for it, they would pay for the value of the hog. Stephen Spicer testified positively that he was not present when the hog was killed or skinned, and that he did not have anything to do with it.

It seems to us that there is no proof which connects the appellant Stephen Spicer with the crime for which he is convicted. No witness testifies that he was present when the hog was killed,

or that he was seen in possession of any of the meat. It is true that two of the witnesses for the Commonwealth say that he testified at the examining trial, and that he was present, but in view of the testimony of Arrowood, the party whose hog was stolen, that he was not present at the examining trial, and had not at that time been arrested, it would seem that the witnesses have simply confounded him with his brother William Spicer, who did testify on that occasion; and, so far as he is concerned, the proof entirely fails to connect him with the crime, and the motion for a peremptory instruction should have prevailed.

The third instruction given to the jury by the court is in these words: "The jury cannot convict the defendant upon confessions made out of open court, unless the same is corroborated by other evidence that the offense was committed, and tending to connect the defendants with its commission." "A confession, in criminal law, is a voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act, or the share and participation which he had in it." See Black's Law Dictionary.

There is no testimony in the record that either of the appellants ever made a confession or acknowledgment of their guilt of the offense charged. On the contrary, they most emphatically deny their guilt, and testify, both on the examining and in the final trial, to facts which conduce to show their innocence. We therefore think that this instruction was misleading to the jury, and highly prejudicial to appellants. The court, in substance, told the jury that appellants had confessed their guilt, but that, notwithstanding such confession, they must not convict them unless there was other proof tending to connect them with the crime. The instruction seems to have no application to any fact which was in evidence on the trial, and should not have been given.

For the reasons indicated, the judgment in each case is reversed, and the cause remanded for proceedings consistent with this opinion.

NOTES (by J. F. G.).—A very valuable and interesting decision, both as to what is a confession, and as to what circumstances will invali-

date a confession, is that of *Carson v. State*, 36 S. C. 524, 15 S. E. Rep. 588, decided July 4, 1892. The defendants, Eddie Carson and Henry Smith, were indicted for the murder of Charles Jenkins. From the evidence it appeared that the defendants and the deceased, all colored lads, came together on June 6, 1891 as servants waiting upon families at a picnic on the banks of a river. About noon Jenkins was missed and no trace was found of him, until his body was discovered on June 10th floating in the river. There was a contused wound over the left eye of the body, a gash evidently made with a sharp instrument on the lower part of the abdomen; but the condition indicated death from drowning. When last seen the three boys were in company, and about the time the deceased was missed, the defendants came up from the river claiming they knew nothing of him; one of them, however, a little after said that Jenkins had complained of having a headache and went to a camp where certain men were working upon a railroad. When the body was found, the defendants were arrested, tied to a tree and guarded during the night. Efforts were made to obtain a confession; and while no direct threats were made, various remarks were indulged in within the hearing of the defendants, to the effect that they deserved hanging, etc. A coroner's jury was impaneled and inquest held; the coroner himself having an interview with the defendants. The defendants finally, while prisoners, each signed a written statement, in which he declared that it was made freely and voluntarily, admitted his presence at the time of Jenkins' death, but accused the other prisoner of the murder. These statements were read in evidence at the trial and both defendants were convicted. The conviction was reversed, the Supreme Court holding that improper inducements had been held out for the purpose of obtaining a confession; that the statements in writing by the defendants that the same was voluntary amounted to nothing; and that in fact the statements themselves were not confessions, in that each one positively denied guilt on his part, but accused the other. The court held that neither statement was admissible against the party making it, and was highly prejudicial as to the co-defendant. This case stands as a leading case, but the opinion is too lengthy to give in full as a part of these notes, and is not capable of being reduced into extracts; accordingly, this general review of it.

GREEN v. STATE.

40 Fla. 474—24 So. Rep. 537.

Decided October 18, 1898.

CONFESSIONS: *Statements by accused at preliminary examination—Instructions with forms of verdict.*

1. In order to render a confession of guilt voluntary and admissible in evidence, the mind of the accused must at the time be free to

act, uninfluenced by fear or hope; and that the confession was so voluntarily made must first be clearly shown before the introduction of the confession in evidence.

2. Confessions should be acted on by courts and juries with great caution.
3. On a preliminary examination before a county judge, an accused was informed by the court when arraigned that it was discretionary with him what he should plead; that, if he plead not guilty, it would be the duty of the court to see that there was sufficient evidence before holding him, and, if he plead guilty, he would be held; that he was not forced to say anything that would criminate himself, and what he did say might be used against him. *Held*, that a plea of guilty, made under the circumstances stated, was properly admitted in evidence, over the objection that it was not shown to be voluntary.
4. The fact that an accused has entered a plea of not guilty to an indictment in the circuit court does not debar the State from introducing in evidence a voluntary confession of the offense charged in the indictment, made by the accused in the investigating court on a preliminary examination.
5. On a charge of murder, the court instructed the jury as to the different grades of the offense, and what constituted manslaughter; that they were the sole judges of the evidence, and should determine from all of it, after full consideration, what were the facts in the case, and render a verdict accordingly; that the accused was presumed to be innocent until the State proved his guilt beyond a reasonable doubt, and, if they had such a doubt, they should acquit him, but, if they found him guilty, they should say so, and determine the degree of the offense. *Held*, that it was not error to follow the charge given with a form of verdict in the event of a conviction, without also submitting a form of verdict in case of acquittal, no request being asked by the accused on the subject.

(Syllabus by the Court.)

Error to the Circuit Court for Santa Rosa County.

Jonah Green, being convicted of murder, brings error. Affirmed.

Daniel Campbell, for the plaintiff in error.

William B. Lamar, Atty. Gen., for the State.

MABRY, J. Plaintiff in error was indicted for the murder of one Sallie Brown, and was convicted of the offense charged. On a writ of error from the judgment of the circuit court, three errors are assigned: (1) The court erred in allowing the county judge to testify as to the plea and confession made in his court

by the defendant. (2) The court erred in giving in its charge a form of verdict if the jury found the defendant guilty, and in not giving the form of verdict if they found him not guilty. (3) The court erred in overruling defendant's motion for a new trial.

The State examined four witnesses who fully sustained the charge of murder against the accused. All four of the witnesses were present, and saw the killing, which was without just provocation or excuse. Intimate relations had existed between the accused and deceased for three months before the killing. On the night of the killing, they were together in a house where the four witnesses examined by the State were, and the deceased went out of a back door, and the accused left the house through the front door. They engaged in a quarrel on the outside of the house for a few moments, and then appeared together at the front door. The accused kicked or pushed the deceased into the house, and went in himself, stopping near the fireplace. The deceased immediately cursed the accused, and said she had had another man, naming him, and was going to keep him. No demonstration of personal violence towards the accused by the deceased was shown, other than the abusive language used by her, and this was after she had been kicked or violently pushed into the house. When the deceased said she was going to keep the other man, the accused drew a pistol and discharged it five times at the deceased, three of the balls penetrating her body, and producing almost instant death. The four witnesses who testified for the State were in the house at the time, and, with slight variation, agree in their statements of what occurred.

After the examination of the four witnesses, the State had sworn the county judge of the county before whom an examination of the charge against the accused was had. He was asked what the accused said in his court. This question was objected to, "because the State had not shown it to be a voluntary confession, and because it called for the defendant's plea in the preliminary hearing after he had already plead not guilty to the indictment." Before answering the question, the witness said that he first told the accused that it was discretionary with him what he should plead; if he plead not guilty, it was the duty of witness to see that there were sufficient grounds to hold him; if

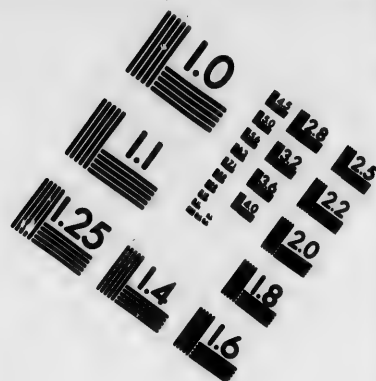
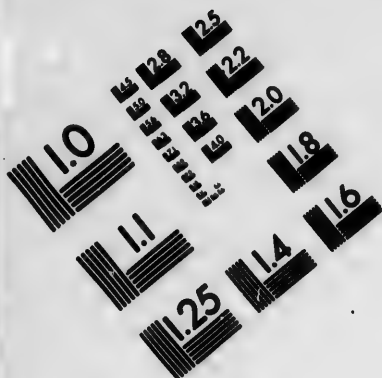
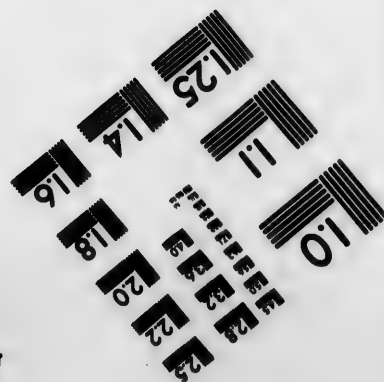
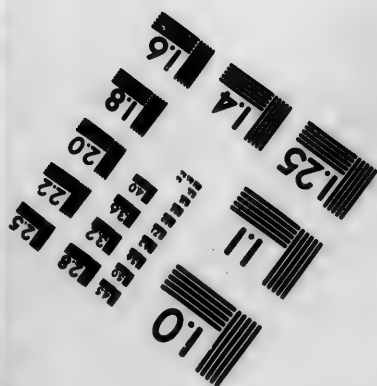
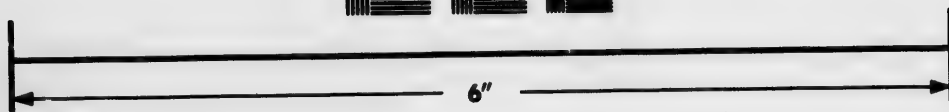
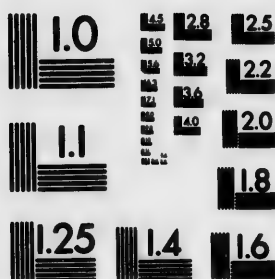


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he plead guilty, he would be held; that he was not forced to say anything that would criminate himself, and what he did say might be used against him. The court permitted the question to be answered, and the witness stated that he read the warrant to the accused, and he pleaded guilty. He was asked what he killed the woman for, and he said he was mad with her. On cross-examination the witness stated that he did not think, from the appearance and what he knew of the accused, that he was sufficiently intelligent to know the different grades of crime of which he might be guilty for killing a person. A motion was then made to rule out the testimony of this witness on same grounds above stated, and this motion was overruled. The accused introduced no testimony, and the verdict was for murder in the first degree.

The objections made to the testimony in the trial court were—First, it was not shown to be voluntary; and, second, because it called for the plea of the defendant in the examining court after he had interposed the plea of not guilty to the indictment. The general rule, recognized by our decisions, is that, to render a confession voluntary and admissible in evidence, the mind of the accused must at the time be free to act, uninfluenced by fear or hope; and, before confessions of crime can be offered in evidence against an accused, it must be clearly shown that they were voluntarily made. Such confessions should be acted upon by courts and juries with great caution. *Simon v. State*, 5 Fla. 285; *Murray v. State*, 25 Fla. 528, 6 So. Rep. 498; *Coffee v. State*, 25 Fla. 501, 6 So. Rep. 493. In the case last cited, it is held that, when a person charged with crime is brought before a justice of the peace or other officer for preliminary examination, it is the duty of the officer to caution the accused that any statement or confession he may make may be used against him, and to inform him of his rights in the premises. In the case of *Regina v. Baldry*, 2 Denison, C. C. 430, which was thoroughly considered, a police constable, who arrested a man on a charge of murder, informed him of the nature of the charge, and further stated to him that he need not say anything to criminate himself, and what he did say would be taken down and used as evidence against him. Thereupon a confession of the crime was made, and it was held that the confession was rightly admitted

in evidence. The same, in effect, was ruled in the case of *Regina v. Attwood*, 5 Cox's C. C. 322.

It appears from the statement given that the county judge sufficiently informed the accused of his rights in the premises, and duly cautioned him that any statement or confession he should make might be used against him. This, clearly, would be so with a person capable of comprehending his rights. We do not understand, from the statement of the county judge in reference to the capacity of the accused to distinguish between the degrees of the offense of killing a person, that he was not capable of comprehending and fully realizing what was told him, and his rights. Technical knowledge is required in some cases to distinguish the degrees of offense in the taking of life, and it imputes no want of capacity to plead to the charge of murder that the accused did not know the different degrees of the offense. Our statute provides that, "when the jury find the defendant guilty under an indictment for murder, they shall ascertain by their verdict the degree of unlawful homicide of which he is guilty, but if the defendant on arraignment confesses his guilt, the court shall proceed to determine the degree upon an examination of the testimony, and pass sentence accordingly." Under this statute, the accused can only be punished for such degree of the offense charged against him as the testimony discloses; and this, notwithstanding a full confession of guilt. Aside from the confession of the accused as given by the county judge, the testimony of four witnesses, without contradiction, establishes the guilt of the accused of murder in the first degree.

The other ground of objection to the testimony is without any force. The authorities cited by counsel on this ground sustain the view that when an accused first pleads guilty to a charge, and afterwards, by permission of the court, is allowed to withdraw such plea, and put in the general issue, the plea of confession allowed to be withdrawn cannot be put in evidence on the trial. That is not the case here. The accused never asked to retract or withdraw what he stated before the county judge; and his statement there, being voluntary, could be used against him on the trial in the circuit court.

It is argued in brief here that the State should not have been

allowed to prove the plea of the accused before the county judge by parol testimony, and the written plea should have been introduced. No such objection as this was made in the trial court, and, in addition, it nowhere appears that any record was ever made of defendant's plea in the county judge's court.

The next assignment of error relates to the form of the verdict given by the court in case the jury should find the defendant guilty. It is not claimed that the court erred in the form given to the extent it went, but the ground of exception is that, along with the form given in case of a verdict of guilty, the court should have stated a form in the event of an acquittal. No request was made for any additional charge or further explanation as to the form of verdict.

On looking at the charge of the court, we find that the judge, after stating to the jury the different grades of the offense of murder, and what constituted manslaughter, instructed them that they were the sole judges of the evidence, and would determine for themselves, from a full consideration of the whole evidence, what the facts were in the case, and to render a verdict accordingly; that the defendant was presumed innocent until the State proved his guilt beyond a reasonable doubt, and, if they had a reasonable doubt of his guilt, they would find him not guilty. The court further instructed that, if the jury found the accused guilty, they should say so, and determine the degree of the offense. In the event of a conviction, the form of the verdict fixing the offense was submitted. We discover no error whatever, in the charge given by the court as to the form of the verdict.

The only remaining assignment of error is that the court improperly overruled defendant's motion for a new trial. The only ground of this motion not already considered is that the evidence is not sufficient to sustain the verdict. In the statement of facts already given, our views as to the sufficiency of the evidence to sustain the verdict are clearly foreshadowed. We entertain no doubt on this point. The testimony of the four eyewitnesses to the killing is amply sufficient to sustain the verdict.

The judgment must be affirmed.

GUIN v. STATE.

Texas Court of Crim. App.—50 S. W. Rep. 350.

Decided March 1, 1899.

CONFESSIONS: *Insufficient warning by sheriff—Convict not a competent witness; but his acts admissible.*

1. A warning given by a sheriff to his prisoner, that anything he would say could be used for or against him, is of the nature of an inducement or persuasion, and does not render the confession admissible, under the statute which provides that it cannot be used, "unless it be made voluntarily after having been cautioned that it may be used *against* him."
2. The owner of stolen cattle, being a convict, cannot testify; nor can his statements be given in evidence; but his actions and conduct may be shown, as proof that the cattle were taken without his consent.

Appeal from the District Court of Baylor County; Hon. S. I. Newton, Judge.

W. T. Guin, being convicted of theft, appeals. Reversed.

J. H. Glasgow and *L. W. Dalton*, for the appellant.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

As material testimony against appellant, the State introduced his confession made to the sheriff while under arrest. The warning given by the sheriff was to the effect that he told appellant, after he had arrested him, that anything he would say could be used for or against him. After this warning given, it is shown that the State introduced from the sheriff the statement of appellant that he got the cattle at Unsell's. This statement was used as a criminative fact against appellant, by showing that it was unreasonable that he could have driven the cattle from whence they had been stolen to Unsell's, and then to the place where they were found. The warning given here was not in accordance with the statute. When it is shown that a defendant is under arrest, the statute (Code Cr. Proc. art. 750) provides that "a statement made by him cannot be used unless

it be made voluntarily after having been first cautioned that it may be used against him." Now, when a warning is that any statement he may make may be used for him, it is suggestive of inducement or persuasion. We hold that, in order to render the statement made under arrest admissible, at least the substantial terms of the statute shall be used; otherwise the statement or declaration made is not admissible. See *Guinn v. State*, 39 Texas Crim. Rep. 257, 45 S. W. Rep. 694.

It also appears in this case that Harvey, the owner of the alleged stolen cattle, was a convict, and could not testify. The State was permitted, over appellant's objections, to prove certain acts of said prosecutor Harvey in search for said cattle, and inquiries made by him for them. The objection is made to this testimony that, inasmuch as Harvey could not be a witness, any acts or statements made by him with reference to said cattle could not be used as evidence. This is true, in a qualified sense. We do not believe that any statements or declarations of his could be used as evidence to prove the theft of said cattle. But we hold that his want of consent to the taking of said cattle could be proved by circumstances,—such as searching for the cattle shortly after they were missed,—and the proof should have been confined alone to this issue of consent *vel non*. The judgment is reversed, and the cause remanded.

DAVIDSON, P. J., absent.

NOTE (by J. F. G.).—Another Texas case, practically in the same line as the above decision, is that of *Rix v. State*, 33 Tex. Crim. Rep. 353, 26 S. W. Rep. 505, decided May 9, 1894. In reversing the conviction, which was for cattle theft, the court said:

"Appellant further complains that the court erred in admitting in evidence a letter written by appellant to Dave Odom, the sheriff, after the interview in the jail. To the admission of this the defendant duly excepted. There is no question appellant was in jail when the letter was written. *Not having been warned, no statement, written or verbal, while in jail, can, under the law, be admitted in evidence against him.* An examination of the letter shows that it is an assertion of his innocence, but it also contains the admission that appellant had put Sheriff Odom on the trail of the Gallaghers, and, had he not done so, they could not have been found out. The evident purpose of introducing the letter was to show appellant's knowledge of, and connection with, the crime. To the same end was introduced the fact that Odom conversed with appellant in jail before he arrested the Gallaghers; also, the letter of date September, 1893, introduced by the State, written by

appellant to the district attorney, offering to testify against the Gallaghers whenever he was wanted. The court erred in admitting the letter to Sheriff Odom. It was a strongly inculpatory fact that he, only, was able to put the sheriff on the track of the guilty parties, for it tended to corroborate the statement of the witness Gallagher; but the evidence to prove such a fact must be legal and admissible. The court should not have permitted proof of what the sheriff did after conversing with appellant, nor should he have permitted the letter to be introduced."

COMMONWEALTH v. WILSON.

186 Pa. St. 1—40 Atl. Rep. 283.

Decided May 9, 1898.

CONFESSIONS: HOMICIDE: *Tricks of detectives—Incompetent evidence—Practice.*

1. Where evidence to prove a conspiracy to rob deceased, and a subsequent attempt to do so, failed to show that defendant took any part therein, or was addressed concerning the same, or assented thereto, or was connected with the alleged attempt to rob, *held*, that an instruction submitting to the jury the question whether defendant was connected with such attempt was erroneous and prejudicial; defendant not having been shown to be a party to the conspiracy, evidence of attempts to carry it out was incompetent.
2. Confessions voluntarily made are entitled to much weight, but when obtained through flattery, hope or fear they lose their value. Where hired detectives persistently take the defendant from place to place, and represent themselves as belonging to a band of outlaws, and induce him, in order to demonstrate his fitness for admission to their band, to represent himself as having committed various crimes, and among others the one for which he was tried, it was the duty of the trial court to have pointed out to the jury the sinister methods and circumstances that detracted from the value of such confessions, so that they might be judged according to their true worth.
3. Defendants' alleged confessions as to their crimes at other places and times, and not connected with the offense for which he was tried, were inadmissible in this case.
4. *Practice*—(a) Objections to evidence should be saved by exceptions. (b) Defendant closed his defense with the understanding that he could call a witness on the following day, no objection being then made. Next day objection was made that the boy produced was only thirteen years of age, and that no showing had been made for calling him out of order, and he was excluded. While ordinarily this is a matter of discretion, this ruling was error.

The age of the witness, of itself, was not objectionable; and by not objecting when the request was made, the Commonwealth had waived its right of objection on the second ground; and the facts to be proved by the witness were apparently of vital interest to the defendant.

Frank Wilson, convicted of murder in the court of O. & T. Blair County, appeals. Reversed.

R. A. Henderson, for the appellant.

William S. Hammond, District Attorney, for the Commonwealth.

WILLIAMS, J. The defendant Frank Wilson was indicted jointly with James Farrell and William Doran for the murder of Henry Bonnecke. He was separately tried, and convicted of murder of the first degree. A new trial was then applied for, which the court below refused, and the defendant has removed the record of his trial and conviction into this court by appeal. Twenty-four errors are assigned to the rulings of the learned judge upon the trial, but the questions raised by them are reducible to six. The first of these is raised by the assignments which relate to the admission of the testimony of Joseph Peddicord, the subsequent refusal to strike it out or withdraw it from the jury, and the treatment of this testimony by the learned judge in his charge to the jury.

When Peddicord was called to the witness stand, the defendant's counsel asked for an offer showing what it was proposed to prove by him. An offer was then submitted as follows: "The prosecution proposes to prove by the witness that Frank Wilson, the defendant on trial, and James Farrell and William Doran, who are jointly indicted and Joseph Peddicord, the witness, did in 1894, and at divers times prior to the time of the murder of Henry Bonnecke, plan, conspire, and agree, together and among themselves, to rob Henry Bonnecke; and, in pursuance of said conspiracy, James Farrell and Joseph Peddicord made an assault with intent to rob the said Henry Bonnecke on February 21, 1895; and that immediately after this attempt James Farrell declared he would have the old man's money if he had to kill him." So much of this offer as related to the conspiracy by the defendant, with others, to rob Bonnecke, and to what had

been done in pursuance of this conspiracy by two of the conspirators, was, we think, competent, upon its face. The theory of the Commonwealth was that the murder had been committed for the purpose of enabling the murderers to rob the old man without outcry or resistance on his part, and the fact that the defendant was one of four conspirators who had agreed upon a plan to rob him but a few months before the robbery and murder occurred was certainly a relevant and an important circumstance for the prosecution. But, when the evidence under this offer was all in, it did not sustain the offer. The witness testified that Wilson was present when the other persons named in the offer talked over the subject of Bonnecke's having money, and how it could be gotten, but that he took no part in the conversation. No part of it was addressed to him, and no response or assent of any sort was made by him. This did not show a conspiracy to which he was a party. Two of the actual conspirators did afterwards make an ineffectual attempt to rob Bonnecke, but Wilson was not with them, nor does it appear that he knew the attempt was to be made. The only spark of evidence to connect Wilson with the conspiracy or the attempted robbery is the fact that he probably overheard some part of the conversation between Peddicord, Farrell, and Doran relating to Bonnecke and his money. If the offer had proposed just what the testimony admitted under it established, viz. that Wilson had overheard a conversation between some of his acquaintances showing their purpose to rob Bonnecke if they could, we have no doubt that it would have been promptly rejected. When the effort to prove a conspiracy to which Wilson was a party failed, the proof of what was alleged to have been done under the conspiracy, and in pursuance of it, became incompetent. The only thing to connect the defendant with the attempt of Peddicord and Farrell to rob Bonnecke was the alleged conspiracy, and, this failing, there was no more reason why the defendant should be affected by their crime than by the crimes of any other persons. For this reason, we think, the evidence, having failed to sustain the offer, should have been withdrawn as the defendant's counsel asked. But that of which the defendant has a right to complain more seriously is the use made of the testimony of Peddicord by the learned judge in his charge.

He said: "To connect the defendant with the killing, the Commonwealth shows by Joseph Peddicord that some time prior to April, 1895, . . . he was in company with William Doran, James Farrell, and the defendant, on the hill west of Altoona; that they had some conversation about Bonnecke's supposed money, which he was, miser-like, hoarding, and as to the methods by which he could be robbed. But Peddicord says that Wilson took no part in the conversation, although he was present." The learned judge then added: "Doran and Farrell are jointly indicted with Wilson, the present defendant, but are not on trial; Doran not having been taken, and Farrell being now in jail. It is further shown that on the evening of February 21, 1895, about dusk, Farrell and Peddicord did attempt to rob Bonnecke, but failed. . . . The Commonwealth argues that Farrell and some other persons, one of whom was the defendant, again attempted to rob Bonnecke, and did rob and kill him, on the night of April 6 and 7, 1895." This gave the Commonwealth the full benefit of the offer, rather than the fair effect of what was actually proved under it, and is, we think, a substantial ground for complaint.

The next question is raised by the assignments numbers seven to ten, inclusive, and relates to the admissibility of the so-called confessions made to, and shown by, the professional detectives who were employed to ferret out the murderers of Bonnecke by the officers of Blair county. Soon after the coroner's inquest was held upon the body of the murdered man, the county commissioners of that county employed a detective agency to work upon the case, and to find out, if possible, who were the murderers, and bring them to trial for their crime. This was a proper thing to do. The detectives entered upon their work at once. Suspicion was directed towards Wilson, among others, but there were no such incriminating circumstances known as would justify his arrest and trial. A plan, somewhat elaborate and skillful in outline, was adopted to obtain such declarations from him as would make his trial and conviction possible. It was put into execution with vigor, and without any regard to truth, or the unconscionable means required. The defendant was led to believe that the detectives about him were the members of a band of outlaws engaged in the commission of great

crimes, including the burglary of banks and the plunder of railroad trains, from which large sums of money were realized by them, and that he could secure admission if his record as a criminal was such as to give assurance of his courage and hardihood. He became an applicant for admission to this band, and the so-called confessions are the statements made by him to the persons whom he understood to be prominent in the organization, and in a position to obtain his admission as a member. He alleged that he had been connected with robberies, burglaries, and larcenies in Pennsylvania and Ohio, and that he was one of the persons who had killed and robbed Bonnecke. Now, we are of opinion that so much of these stories of his own crimes as related to the killing of Bonnecke was admissible, not as a confession, in the ordinary sense of that word, but as a statement made by him relating to that subject, the value of which was for the jury to determine. It was made for a definite purpose, which he was anxious to accomplish, viz. to satisfy the supposed criminals by whom he was surrounded that he was capable of crimes as great, and possessed of a record as black, as they, and that he could be trusted implicitly to keep their counsels, and to assist in their lawbreaking schemes. There was a temptation, in the circumstances under which he was acting, to represent himself to be, if possible, worse than he really was. His attention was on an ulterior object. Confession, for the purposes of confession, was the furthest possible from his thought. Still what he said was admissible in evidence against him. It should go to the jury, however, for no more than it is worth. A confession voluntarily made is entitled, ordinarily, to great weight. If it is, in the language of Mr. Greenleaf, "forced from the mind by the flattery of hope or the torture of fear," induced by representation made to the accused, its value is lost. It should be excluded altogether. If it is induced by what may be called "collateral inducements," it occupies a kind of intermediate position. Such inducements are to be considered as affecting, not the admissibility of the statements made by the prisoner against himself, but their credibility. They should go to the jury with the inducements that led to them, in order that the jury may see how they came to be made, and the motive that operated on the prisoner's mind when they were made. The jury can then,

judge of their value, and determine the weight to which they are entitled.

The learned trial judge seems to have followed, in part, the rule we have indicated, and to have sent all the circumstances and inducements leading to the so-called confessions to the jury. The only just ground of complaint is that the attention of the jury was not called distinctly to this subject in the general charge, and the situation and value of statements like those testified to by the detectives pointed out. This duty of the judge under such circumstances is commented on in *State v. Wentworth*, 37 N. H. 218, where the collateral inducement was the desire to obtain a reward that had been offered; in a Virginia case (14 Gratt. 652), where it was the hope of the prisoner to benefit his mother by his confession; in *People v. Smalling*, 94 Cal. 112, 29 Pac. Rep. 121, when it was to aid his sister; in *State v. Grant*, 22 Me. 171, where it was to save a brother. In all these cases the confessions were admitted, but the collateral inducements under the influence of which they were made went with them, to enable the jury to determine the degree of reliance to be put upon them. But Wilson's statements in regard to crimes committed at other times, at other places, and upon other persons, having not the least connection with the killing of Bonneeke, were not admissible against the defendant in this case. They served to blacken his character, to arouse indignation against him in the minds of the jurors, and to show him to be a monstrous criminal, who was capable of any crime in the calendar, but they threw no light on the question the jury had to determine. If a conviction upon general principles could be defended, then possibly all this evidence relating to other crimes would be proper, but upon a trial for a specific crime the evidence should bear some relation to the question of the defendant's connection with the particular crime charged. Proof of other crimes may sometimes become competent for a particular purpose, as in *Commonwealth v. Ferrigan*, 44 Pa. 386, where the purpose was to show the *quo animo* of defendant, and motive; or in *Goersen v. Commonwealth*, 99 Pa. 388, to establish identity, deliberation, or guilty knowledge; or where the two offenses are connected in character and purpose, as in *Kramer v. Commonwealth*, 87 Pa. 299; but the general rule, as we have

stated it above, is recognized in all these cases, and in the textbooks. Many cases in support of it are cited in 6 Am. & Eng. Ency. of Law (2d ed.), p. 533.

In this connection the question raised by the fourteenth, fifteenth, sixteenth, and seventeenth assignments will be most conveniently considered. These assignments all relate to the admission of the testimony of witnesses called to prove an attempt by the defendant to rob one P. A. Schwab, a resident of Altoona, on April 27, 1895. This occurred some three weeks after Bonneeke was killed, and had not the slightest connection with that crime. If it had been offered as part of the case of the Commonwealth against the defendant at the trial, it would have been rejected, as a matter of course; but the defendant, when on the stand in his own behalf, had denied any connection with the attempt to rob Schwab, and this evidence was offered with a view to contradict him, and so affect his credibility as a witness. It was probably competent for that purpose, unless the answer of the defendant was made upon cross-examination, under such circumstances as to make his answer conclusive upon the Commonwealth. We do not find in the record that its admission was excepted to, and its admissibility is therefore not raised in any proper way. If there is ground of complaint, it is that the jury was not instructed in the purpose of its admission, and the effect to be given to it by them.

The twelfth and thirteenth assignments may also be considered together. It appears that, when the defendant was about to close his case in chief, his counsel called the attention of the court to the fact that one witness whom they desired to examine was not present, and asked to have the privilege of calling him out of place on the following day. With this understanding, to which no objection was made, the defendant rested. On the next day the witness, a lad under thirteen years of age, came into court with his mother. He was called to the stand, and the subject to which his attention was to be called was stated. Thereupon the counsel for the Commonwealth objected to his examination, for these reasons: First, because of his age; next, because the subject to which it was proposed to call the attention of the witness had not been stated when the right to call him had been reserved on the previous day; and, last, because the evi-

dence was not properly in surrebuttal. These objections were sustained, and the witness excluded. We think this was error. The witness was not incompetent because of his age. If it was alleged that he was unacquainted with the nature of an oath, he should have been examined upon that subject, and, if necessary, instructed in the presence of the court. He alleged that he was fully aware of the nature and importance of an oath. He was the son of a local magistrate, and had some familiarity with the proceedings in his father's court. His knowledge should have been tested before his rejection upon this ground. The second ground of exclusion was not sufficient. If the Commonwealth or the court had asked, before consenting to call the witness out of order, for what purpose the testimony of the witness was wanted, it would have been the duty of the defendant's counsel to state fairly just what it was. But, failing to do this, the consent of the court was given to call him out of order, and with that understanding the defendant rested his case. The calling of him when he came in was a return to the case in chief of the defendant, and if his testimony would have been competent when he was first called and found not to be in the court room, it was competent when he was actually called on the following day. This disposes, also, of the third and last objection, that the evidence was out of order when it was proposed to give it. It would have been out of order, but for the reservation of the right to call him when he came in, made and assented to before the defendant closed his case in chief. The fact which the witness was expected to testify to was one which, if the jury had believed his story, would have made the conviction of the defendant impossible. It was that he had called at Bonnecke's house, at the direction of his mother, in the morning of Saturday, the 6th of April, 1895, knocked at his door, and tried to obtain admission, without success. He had also climbed on the railing at the side of the porch, and looked into the room through the window, but could see only a heap near the door, covered with blankets, and an empty boot lying near it. What was under the blankets, he could not tell. When the officers effected an entrance into Bonnecke's house on Sunday, at noon, they found a heap near the door, covered with blankets, and an empty boot near it. On removing the blankets the body of the mur-

dered man was found under them, with one boot on, and the other lying empty on the floor close by, but not covered by the blankets.

The effect of the testimony of Smith was to fix the murder at an hour prior to his visit to the house on Saturday morning. Wilson was then in the county jail at Hollidaysburg, and had been for some weeks. His release did not occur until between two and four o'clock in the afternoon of Saturday. The rejection of the testimony of his mother, who was called at the same time, is the subject of the thirteenth assignment. She was called out of order. The right to call her had not been reserved. It would not have been error in the learned judge if he had disregarded the question of order and admitted the witness, nor can we say it was error to sustain the objection and reject her. Questions relating to the order of the testimony alone are quite largely, in such cases, under the sound discretion of the trial judge.

The remaining questions relate to the adequacy and fairness of the charge of the learned judge, and are raised by the nineteenth, twenty-first, and twenty-second assignments of error. They complain that undue prominence was given to the testimony of some of the witnesses for the Commonwealth; that the theory of the defense was misunderstood, and therefore inaccurately stated to the jury; and that the circumstances calculated to weaken the force of the testimony of the detectives were overlooked or greatly minimized. These objections require us to look in a general way, and very briefly, at the case presented at the trial. Bonnecke was an old man, unable to work, and quite infirm. There were rumors that he had a little money laid away, that he was hoarding, but there were no indications of it in his humble cabin, or in his own appearance. He lived alone, in a little house containing but one room. His furniture was very poor and very scanty. His food was simple, and was mainly supplied by the charity of his neighbors. He was timid, avoided people generally, was seen but little on the streets, and usually, when in the house, had the doors securely locked. Most of his neighbors say that he was not seen by them, nor was light observed in his windows, nor smoke rising from his chimney, after Thursday night. Some thought they saw him on Friday.

Some others are of opinion that they saw him on Saturday, but on neither of these days did any of those who supplied the old hermit with food succeed in getting into his house, or getting any response to their knocks on his door, or other efforts to attract his attention. His house was finally entered on Sunday, as we have already stated, about the middle of the day. He was found on the floor dead. His body was covered with the old blankets he had used as covering upon his rude bed. His bed had been torn open, and presented the appearance of having contained, in the middle of the straw, some small, round object, which had been removed. His boxes had been searched, and their contents left in a state of confusion. The body did not appear to have been affected by the *rigor mortis* at the time it was found, and there was a little pool of blood on the floor, near his head, which was not examined, but which the witnesses said did not appear to have coagulated. A handkerchief had been drawn through his mouth so tightly, and tied so securely behind his head, that the coroner thought he would have died from strangulation alone, but he had received a blow upon the head that had broken his skull vertically from its top to the base. Very soon after the discovery of this brutal murder, the officers of the county determined to unravel the mystery that surrounded it, if possible, and bring the perpetrators to punishment. For this purpose the detective agency of Barring & McSweeney was applied to, and they detailed men for the purpose of working upon the case, and discovering the guilty parties, if possible. The detectives caused the arrest of Wilson, and secured, by means already alluded to, the statements or confessions, as they are called, without which no conviction could have been had on the evidence that was given at the trial. Most of the important evidence for the Commonwealth was furnished by the detectives. They and their methods were bitterly assailed by defendant's counsel. The case was exceptional, for several reasons, and the duty of holding the judicial scales evenly was by no means easy of performance. But, when the charge of the learned judge is considered as a whole, we do not find in it any inadequacy, except as we have already pointed out, nor do we find any indication whatever of either prejudice or partiality. It is true, he did not share the bitterness of the defendant and his counsel to-

wards the work of the detectives, or towards their testimony, but he left their credibility to the jury. The charge may be justly criticised to some extent for its want of fullness in its treatment of some of the subjects to which the assignments under consideration relate, but nowhere does it seem wanting in fairness; nor does it fail to bring to the notice of the jury the main questions upon which they were to pass. The objections to the charge, therefore, which assert partiality and prejudice, are dismissed without further discussion. The assignments of error which we have sustained, however, require us to reverse this judgment, and send the case back to the court below for another trial. The verdict may be right, in finding the defendant guilty of the murder of Henry Bonnecke. We express no opinion upon that question. But if the jury was influenced, or might naturally have been influenced, by irrelevant considerations, or by the absence of evidence that was competent and relevant, the verdict rendered by them under such circumstances ought not to stand. It is for this reason that the judgment appealed from is now reversed and set aside, and a writ of *venire facias de novo* is awarded.

COMMONWEALTH v. GOODWIN.

186 Pa. St. 218—40 Atl. Rep. 412; 65 Am. St. Rep. 852.

CONFESSIONS: *Obtained by artifice.*

Decided May 16, 1888.

1. A confession obtained by artifice, but without suggestions of favor or danger, is admissible in evidence.
2. A letter written by the prisoner while in jail and kept by the jailer is admissible in evidence.

Appeal from the Court of Oyer and Terminer of Tioga County.

Walter E. Goodwin, being convicted of murder, appeals. Affirmed.

At the prisoner's request, and apparently as a favor to the prisoner, the sheriff permitted the prisoner to go to the cell of

Gertrude Taylor, who was in jail charged with the same crime. Before admitting him to the cell the sheriff walked him around the corridor to show him that no one else was near; but the sheriff had placed deputies over Taylor's cell to hear the conversation, evidence of which was afterwards admitted at the trial. After the interview in the cell the defendant wrote a letter to Taylor, and gave it to the sheriff, who promised to deliver it, but which he retained; which letter was also admitted in evidence.

David Cameron and Jerome B. Niles, for the appellant.

Andrew B. Dunsmore, Dist. Atty., and *Merrick & Young*, for the Commonwealth.

MITCHELL, J. The assignments of error are based on the refusal to strike out the testimony of Gertrude Taylor and of the two deputy sheriffs as to what the prisoner said in the interview with the girl, and on the admission of the prisoner's letter to her. The only objection is that the Commonwealth obtained the evidence by an artifice which the prisoner did not anticipate or suspect. There is nothing substantial in this argument. The means by which the Commonwealth obtains its evidence must vary with the circumstances of each case. In dealing with crime, nicety of method and considerations of delicacy must often give way to necessity. If the rule were otherwise, the testimony of accomplices, and even of detectives, would seldom be admissible, and crime, which works in the dark, would go unpunished. The conversation between the prisoner and Gertrude Taylor was of an incriminating character, amounting practically to a confession, and we may concede that its admissibility is to be determined by the same rule. If it had been accidentally overheard, or his letter had been carelessly dropped by her, and found by the sheriff, there could have been no objection to the use of them by the Commonwealth. But there is nothing in the circumstances to produce a different result. The prisoner has no right to object unless the evidence was cajoled or forced from him by inducements or threats from those whose authority over him would make their promises or threats equivalent to duress. There was no such element here. Both the interview

and the letter were the prisoner's voluntary act, on his own initiative, and for his own purpose. Neither his hopes nor his fears were raised by any act of the sheriff. In *Com. v. Smith*, 119 Mass. 305, the prisoner, a girl of fourteen, made a confession to the officers who had her in custody. The judge at the trial ruled that "mere fear on the part of the defendant did not render the confession incompetent unless induced by some improper conduct on the part of the officers," and this was affirmed, the court saying, "To avoid the effect of this confession, the hope or fear which led the defendant to confess facts unfavorable to her, must be induced by the threats, promises, or conduct of the officers." And in Wharton on Criminal Evidence, sec. 644, it is said, citing cases, "Nor is it fatal to the admissibility of such a letter that it was in answer to a letter meant as a trap." "Though it is necessary to the admissibility of a confession that it should have been voluntarily made,—that is, that it should have been made without the appliances of hope or fear from persons having authority,—yet it is not necessary that it should have been the prisoner's own spontaneous act. It will be received, though it were induced by spiritual exhortations, whether of a clergyman or of any other person, or by a solemn promise of secrecy even confirmed by an oath, . . . or by any deception practiced on the prisoner, or false representation made to him for that purpose, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered." 1 Greenl. Ev., par. 229. "A confession procured by artifice is not for that reason inadmissible unless the artifice used was calculated to produce an untrue confession." 3 Am. & Eng. Enc. Law, tit. "Confessions," § 5. The subject was very carefully considered in a noted case somewhat analogous to the present,—*Commonwealth v. Hanlon*, 8 Phila. 423. The prisoner there, being charged with murder, was put in the same cell with a criminal named Dunn, for the purpose of obtaining, if possible, evidence to convict. At the trial, Dunn's testimony as to a confession made by the prisoner was admitted, and upon it the latter was convicted and executed. The trial was presided over by a judge of great experience in criminal cases, the late Judge Ludlow, assisted by Judge Brewster; and

in the former's opinion refusing a new trial he states that the result of their examination of the subject was concurred in by their colleagues the late President Judge Allison, and Judge Paxson, subsequently chief justice of this court. The rule as stated by these authorities is far stronger than is required to sustain the present case. In regard to the admission of the prisoner's letter, we have an authority directly in point in *Rex v. Derrington*, 2 C. & P. 418. A prisoner gave a letter to a turnkey under promise that it should be posted, but the turnkey gave it to the prosecutor. Baron Garrow held that it was admissible, saying the only cases where what a prisoner says or writes is not evidence are: First, "where he is induced to make any confession in consequence of the prosecutor, etc., holding out any threat or promise to induce him to confess; and, secondly, where the communication is privileged as being made to his counsel or attorney." By the well-settled rules, therefore, the evidence was properly received. Judgment affirmed, and record remitted for purpose of execution.

NOTES (by J. F. G.).—The general conclusion arrived at by the court was correct, that the conversation was with, and the letter addressed to, one in whom the prisoner reposed confidence, and that the circumstances indicated voluntary statements, untainted by the tricks used by the officers to obtain them; but the court in saying, "the prisoner has no right to object unless the evidence was cajoled or forced from him by inducements or threats from those whose authority over him would make their promises or threats equivalent to duress," went not only beyond the limit necessary to sustain that confession, but announced a doctrine not consistent with reason. Confessions made under suggestions of hope or threats of danger are rejected, because under such circumstances the statements may be adverse to, or deviate from, the truth. This being so, it should make no difference whether the influence was exerted by friend or enemy, officer or civilian, prosecutor or stranger. If by reason of promises of compensation or suggestions of influence to be used in the prisoner's favor, by one who is in fact guilty, an innocent man is induced to confess; or if, by threats made by persons not connected with the case, a prisoner is induced to believe that his welfare depends upon a confession, the effect is the same as though the promise or threat came from the prosecutor, or from the officer in charge. The weight of authority does not sustain the proposition that the promises or threats should be "equivalent to duress."

For further review of this subject, see the cases reported in this volume and the notes upon the subject of "Confessions."

REGINA v. ROSE.

18 Cox Criminal Cases, 717.

Crown Cases Reserved.

Before Lord Russell, C. J., Hawkins, Mathew, Lawrence and Wright, JJ.
Saturday, February 5, 1898.

CONFESSIONS: *Involuntary—Inducements—Bail.*

1. A confession made in consequence of an inducement held out by a person in authority is not admissible in evidence. A statement made by an accused person after he has been told that it will be better for him to speak the truth cannot be admitted as evidence against him.
2. It is the duty of prosecuting counsel and solicitors having the charge of prosecutions to satisfy themselves, before putting in evidence a confession, that it was not made under such circumstances as to be inadmissible.
3. Bail is not to be withheld unless it is otherwise impossible to insure the prisoner's attendance at the trial.

Case stated by the chairman of the Norfolk Quarter Sessions.

The prisoner was indicted for larceny of certain corn, chaff, sheep, poultry, and grass seeds, the property of his master, one Corney. It was stated in the case that Corney, in the presence of a police constable, had asked the prisoner how he accounted for the number of the sheep on the farm being less than it should be, and the prisoner then admitted that he had sold a lamb and an ewe to certain persons. In giving his evidence Corney stated that the prisoner, after making the statement as to the sheep, had, in answer to questions, stated that he had also disposed of certain quantities of corn and chaff. On cross-examination the prosecutor admitted that he might have said to the prisoner, "You had better tell me about all the corn that is gone." Robert Corney, a nephew of the prosecutor, being called, subsequently stated that the prosecutor had asked the prisoner to speak the truth, saying that "it would be better" for the prisoner to do so. Counsel for the prisoner submitted that these statements of the prisoner as to the corn had been made on his inducement to confess, and were therefore not admissible in evidence against him, but the court allowed the whole case to go to the jury, who convicted the prisoner on the whole indictment.

E. E. Wild, for the prisoner. The prosecutor induced the prisoner to confess by telling him that it would be better for him to speak the truth. A confession made in consequence of such an inducement is not admissible evidence; the jury should have been told to disregard it, or evidence of the confession having been given, and being subsequently found to be inadmissible, the jury should have been discharged, and the case tried by a fresh jury. Neither of these courses having been adopted the conviction was bad, and should be quashed.

LORD RUSSELL, C. J. In my opinion this conviction cannot be allowed to stand. The prisoner, who had been employed by a farmer in a more or less confidential capacity, was charged with stealing a variety of articles and property of his master, amongst other things sheep and corn, and was tried at the Norfolk Quarter Sessions in January. It appears that the prosecutor, having reason to suspect that some of his property had been improperly dealt with, spoke to the prisoner, who then, as to some of the articles, confessed, and confessed voluntarily, but, after making this confession, he was pressed to make a full confession, and to confess to having taken the corn. That is clear from the evidence of the prosecutor's nephew, who said that his uncle had asked Rose to speak the truth, telling him that it would be better for him if he did. This amounts to evidence that the confession was not voluntary within the meaning of the authorities. A question of some delicacy then arises as to the course which the magistrates ought to have adopted. It is clear that the evidence ought not to be admitted; but ought the court merely to tell the jury to disregard it, or ought the court to discharge the jury and try the case again? In this case, however, the whole of the evidence was allowed to go to the jury, who found a general verdict. The rule, which is very old, and is stated just as clearly in the old as in the modern authorities, will be found in East's Pleas of the Crown, vol. 2, at p. 657. Lord Campbell, in *Reg. v. Baldry*, 19 L. T. Rep. (O. S.) 146, 21 L. J. 130, M. C., admitted a confession made by a prisoner after he had been cautioned by a policeman, because, as is correctly stated in the head-note to the case, "the observation of the policeman did not amount to any promise or

threat to induce the prisoner to confess so as to render a confession which the latter made after it admissible." In *Reg. v. Jarvis*, 17 L. T. Rep. 178; L. Rep., 1 Cr. Cas. Res. 96; 10 Cox C. C. 574, the prisoner's master said to him, "You are in the presence of two officers of the police, and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue;" whereupon the prisoner made a confession which the court held to be admissible, Willes, J., saying that the case would have been different if the master had said, "It is better for you to tell the truth." The principle is also laid down by Cave, J., in *Reg. v. Thompson*, 69 L. T. Rep. 24; (1893) 2 Q. B. 12; 17 Cox C. C., at p. 645, with the concurrence of the late Lord Chief Justice, that a confession is not admissible if it is preceded by an inducement held out by a person in authority. Seeing, then, that in the case before us there was used the very words which it has been held render a confession inadmissible, in my opinion this confession was not admissible, and that it having been admitted the conviction which followed it was bad. It is to be borne in mind not only by magistrates but by prosecuting counsel and by solicitors having the charge of prosecutions, that they must satisfy themselves before putting a confession in evidence that the confession was not obtained under such circumstances as to be inadmissible. I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at the trial.

HAWKINS, MATHEW, LAWRENCE, and WRIGHT, JJ., concurred.

Solicitor, W. A. Watts, St. Ives, Hunts.

The Crown did not appear.

NOTES (by J. F. G.).—The case of *Regina v. Thompson*, cited by the Lord Chief Justice in the above opinion, is the same as *Queen v. Thompson*, 9 Am. Crim. Rep. 269. The decision was announced by Lord Chief Justice Coleridge as follows: "In this case we are all agreed that the conviction cannot be supported, and my brother Cave has

written a judgment which we have all read, *and with which we all agree.*" The opinion is one of exceptional merit, and although it appears in full in a previous volume of these Reports, we do not deem it a trespass upon the reader's patience to quote from it the following:

"I would add that, for my part, I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse, to supplement it with a confession, and this desire itself again vanishes as soon as he appears in a court of justice."

Two other leading "Crown Cases Reserved."—*Rex v. Jones*, Russ. & Ryan, 152, decided in 1809, and *Rex v. Upchurch*, 1 Moody, C. C. 465, decided in 1836, are accepted as authorities. The report of each is so brief we here give them in full:

REX V. FRANCIS JONES

Larceny.—The prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but *before the money was produced* said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" upon which the prisoner took 11s. 6½d. out of his pocket and said *it was all he had left of it. Held*, that the confession ought not to have been received.

The prisoner was tried before Mr. Justice Chambre, at the Winchester Lent assizes, in the year 1809, upon an indictment for stealing money to the amount of 1l. 8s., the property of John Webb, a private in the Somerset militia.

A part of the evidence was as follows:

The prosecutor, who, as well as others, had been in pursuit of the prisoner, found him, at last, in a room of a public house, in custody of a constable, to whom he had been delivered by a serjeant of marines, who had apprehended him. On finding him there, the prosecutor asked him for the money that he, the prisoner, had taken out of the prosecutor's pack, upon which the prisoner took 11s. 6½d. out of his pocket, and said it was all he had left of it. The serjeant (who was in the same room with the constable and the prisoner) gave the same account of the conversation and of the production of the money by the prisoner; but he added that Webb, the prosecutor, before the money was produced, said "*he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased.*"

The money (11s. 6½d.) was taken charge of by the serjeant.

The learned judge left the whole of this evidence for the consideration of the jury, and they found the prisoner guilty.

In Easter term, 29th of April, 1809, the majority of the judges present, viz., Macdonald, C. B., Chambre, J., Lawrence, J., Le Blanc, J., and Heath, J., held that the evidence was not admissible, and the convic-

tion wrong. Wood, B., Grose, J., Mansfield, C. J., of C. B., *contra*. Lord Ellenborough *dubitante*.

REX v. MARIA ANN UPCHURCH.

A confession obtained from a servant through hopes and threats held out by the wife of the master and the prosecutor is inadmissible.

The prisoner, a girl aged thirteen, was indicted and tried before Mr. Baron Parke, at the Summer Assizes, 1835, at Huntingdon, for a misdemeanor, in attempting to set fire to her master's house.

On the part of the prosecution it was stated that the case could not be made out without the prisoner's confession, and the learned baron received it in evidence, reserving the question as to its admissibility for the consideration of the judges. The prisoner was convicted, but the learned baron deferred passing sentence.

The prisoner was a domestic servant to the prosecutor, who kept a beer-house. His wife lived with him, and took her share of the management of the house. After the attempt to set the house on fire was discovered, the prisoner came into the room where her mistress was, in the absence of the prosecutor, and her mistress said to her, "Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H." (another person suspected, and whom the prisoner had charged) "is found clear, the guilt will fall on you." She made no answer. The mistress then said, "Pray, tell me if you did it." The prisoner then confessed.

It was contended on the part of the prisoner¹ that the prosecutor's wife had no authority, real or apparent, over the prisoner so as to hold out any hope which would influence the prisoner to make a false statement, in order that her life might be spared, and therefore that the confession was admissible, and *Rex v. Hardwick*, Phillips on Evidence, 105, and *Rex v. Row*, Russ. & Ry. 153, were cited.

The learned baron reserved the point.

In Hilary Term, 1836, Lord Denman, C. J., Tindal, C. J., Lord Abinger, C. B., Park, Littledale, Gaselee, JJ., Parke, Bolland, Gurney, BB., Williams, J., met and considered this case, and they thought the confession ought not to have been received.

¹The word "prisoner" is evidently by mistake for the word "prosecution," in the clause, "It was contended on part of the *prisoner*," but we give it as it appears in the report.—J. F. G.

SULLIVAN V. STATE.

66 Ark. 506—51 S. W. Rep. 828.

Decided June 3, 1899.

CONFESSIONS: Invalidated by previous promise.

1. A confession obtained by offers of favor made by the owner of stolen property is not admissible.
2. An instruction, that the proof of the fact that the property was stolen together with the confession introduced will justify a verdict of guilty, is erroneous, in that it assumes certain facts to have been proven.

Appeal from the Circuit Court of Greene County; Hon. Felix G. Taylor, Judge.

William Sullivan, being convicted of larceny, appeals. Reversed.

Crowley & Huddleston, for the appellant.

Jeff Davis, Atty. Gen., and *Chas. Jacobson*, for the State.

Statement of facts by the court.—At the September term, 1895, of the Greene circuit court, the appellant, William Sullivan, was indicted for grand larceny. At the spring term, 1899, the cause came on for trial. Appellant, waiving formal arraignment, entered his plea of not guilty, was tried, convicted, and sentenced to one year in the penitentiary, and appealed to this court.

The evidence upon which appellant was convicted, in part, is as follows:

B. A. Johnson, for the State: "Was acquainted with the appellant in May, 1895. About that time witness had fourteen or fifteen dollars' worth of meat stolen from him. Don't know of my own knowledge who took it. Other parties found the meat. I identified it by a wire that it was hung up by. This was in Greene county, Arkansas."

O. M. Batey, for the State: "Was a justice of the peace in Greene county in 1895. At that time two men named Allen were tried before me for the larceny of some meat. William Sullivan testified before me that time. I made no promise to him to get him to make a statement. Sullivan testified that he

and one of the Allen boys went to Col. Johnson's smoke house, and pried the hinges off the door, and went in, and carried off a certain amount of meat; took it off a piece; met the other Allen boy there with a sack to help them carry it off. He said they took three (3) middlings and four (4) hams. I committed William Sullivan to jail. This was some time after. I made no promise of leniency to get him to testify. I was using him as a witness against the Allen boys. I did not bind him over for stealing the meat, but for stealing the clothes." The evidence of the witness as to Sullivan's testimony before him was objected to by appellant, and proper exceptions saved, and was excluded by the court, and the jury told not to consider it at all.

B. A. Johnson, for the defense: "I had a talk with Sullivan about stealing the meat before he went on the stand at Esquire Batey's. He came to my house not a great while after the meat was taken, and I got after him for I suspected that he knew about the parties. I thought he was young, and I could get him to tell about it. He told me finally, after working with him for some time, that he would let me know the next day. He said that he thought that the meat could be found. My recollection is that he went and had a conversation with his aunt, and he agreed to tell the story if we would agree to make it easy with him. I told him that I would make a State's witness of him, to help convict the others. At the examining court it was my understanding that he was not to be bound over; that, if we bound him over, the whole thing was gone. I think I told his aunt to go and see him, and we would try and make it as light on him as possible. It was our understanding that he would not be prosecuted if he would testify against the Allen boys. I was not holding any office in the county at that time, nor acting in any official capacity whatsoever. Sullivan confessed being with the Allen boys at the time they stole the meat. I simply told appellant that I would do all I could to make a State's witness of him against the Allen boys, if he would testify; that, if he would tell all he knew about it, I would do what I could to make him a State's witness; that I would use my efforts to have that done." Defendant moved the court to exclude the testimony of B. A. Johnson in regard to the confession made to him. Motion overruled, and exceptions saved.

OPINION BY HUGHES, J. (after stating the facts). After much other testimony had been given, the court instructed the jury "that the confession made by the defendant to Col. B. A. Johnson, together with the fact that the meat was stolen, will justify you in finding the defendant guilty." Defendant accepted.

The testimony of Col. B. A. Johnson as to the confessions of the defendant was not admissible. The proof shows that they were made by the defendant in the hope that, if he would confess, he would be made a State's witness against others, and that he would not be bound over or prosecuted "if he would testify against the Allen boys." This was promised him by Col. B. A. Johnson before he went on the stand as a witness. Col. Johnson, at the time he induced the defendant to make the confessions, was not in official position of any kind; but he was the owner of the stolen meat, the party injured, and really the prosecutor in the case, and as such was a person in authority, within the meaning of the law.

In *Warickshall's Case*, 1 Leach's Cr. Cas. (263), Eyre, C. B., said: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." "The material inquiry, therefore, is whether the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind." 1 Greenl. Ev., § 219. Lord Campbell stated the rule to be that "if there be any worldly advantage held out, or any harm threatened, the confession must be excluded." *Reg. v. Baldry*, 16 Jur. 599, 12 Eng. Law & Eq. 590. If the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person. 1 Greenl. Ev., § 222; *Com. v. Sego*, 125 Mass. 210; *Knapp's Case*, 10 Pick. 489; *Charles v. State*, 11 Ark. 408; *Corley v. State*, 50 Ark.

305, 7 S. W. Rep. 255; *Reg. v. Moore*, 16 Jur. 622, 12 Eng. Law & Eq. 583.

It is true that, the principle of law that the confession must be voluntary being strictly adhered to, the question whether it is voluntary must be decided primarily by the presiding judge.

The instruction given by the court was clearly erroneous. It invaded the province of the jury, in assuming as a fact that the meat was stolen, and in telling them to give full credence to the testimony of Johnson, and to the confession of the defendant alleged to have been made to him, which we have shown was inadmissible. It is error for the court, in charging a jury, to assume facts to have been proven, when they are disputed, or to charge the jury upon the weight of evidence. This is elementary. The constitution forbids it. For the errors indicated, let the judgment be reversed, and the cause remanded for a new trial.

BUNN, C. J., and BATTLE, J., did not participate.

NOTES ON THE LAW REGARDING CONFESSIONS (by J. F. G.).—In theory of law, while a confession is not competent evidence to prove the commission of a crime, a confession voluntarily made by the accused is competent evidence to connect him with the crime charged; hence the character of the confession should be such that, when considered alone, it would be *prima facie* sufficient to fully convince the ordinary mind that the statements contained in it are true.

So numerous have been instances of confessions extorted from innocent people that both in England and America it has become a fixed rule, first, that the *corpus delicti* cannot be proven by confession, but requires other competent proof; second, where the *corpus delicti* has been proven by other evidence, a confession will not be received to fix guilt on the accused unless it be free from influence of fear, favor or hope.

As it is unsafe to base a judicial conclusion upon the evidence of a witness who is manifestly influenced by some motive other than that of simply relating the truth, so the law regards it unsafe to receive, against one accused of crime, statements made by himself under the influence of hope, favor, or fear; for in such case the evidence does not flow from a desire to make known the truth, and in fact is not such evidence as should direct the mind in determining so important an issue.

The late Chief Justice Shaw of Massachusetts, speaking of this subject, says that such confessions by an accused ought not to be received, "because he may be induced by the presence of hope or fear to admit facts unfavorable to him, without regard to the truth, in

order to obtain the promised relief, or to avoid a threatened danger; and, therefore, admissions so obtained have no just or legitimate tendency to prove the facts admitted."

But few of the confessions offered in evidence are made, or are claimed to have been made, previous to the arrest. Notwithstanding the fact that while at liberty the accused evinced no desire to unburden his conscience or to forfeit his right to freedom, nor displayed such desire, if ever, until the arts and strategy of detectives are skillfully applied, yet the officer who has received, or pretends to have received, the confession, is ever ready to declare on his oath that the confession was free and voluntary, and made without use of either threat, suggestion or promise. In fact, the average police officer, subject to the strict rules of police discipline and biased by the desire of success and promotion, is predisposed to adjudge the prisoner guilty, and deems it his duty, by means lawful or unlawful, to obtain a confession from any person in his custody whom he suspects to be guilty of crime; and having so obtained it, his corresponding duty, to conceal from the court the means used, lest all of his ingenuity and labor expended comes to naught and himself the subject of police ridicule. To make a conviction certain, and to prevent the prisoner from repudiating the extorted confession, it is generally reduced to writing, signed and sworn to. The original statement, necessarily somewhat disconnected, and the crude language not meeting with the approval of the scribe, the entire matter is put in form in which those parts not desired may be eliminated as immaterial, but in which the desired features lose none of their force, if they are not even accentuated at the will of the scribe.

Common knowledge as to the surroundings of the ordinary prisoner and the means used and influences brought to bear upon him in the average police station or jail, together with the experience of courts in relation to confessions, have induced courts to recognize as a fixed rule that no confession shall be admitted in evidence unless, upon a preliminary inquiry, the court from the evidence is satisfied that the confession, if made, was free and voluntary.

Previous to admitting an alleged confession in evidence, a preliminary hearing as to its admissibility must be had, in which the burden is on the prosecution to prove that a confession was made, and that it was freely and voluntarily made.—In *Thompson v. Commonwealth*, 20 Grat. (Va.) 724, the court said: "That the confession is voluntary, being therefore a condition precedent of its admissibility, and the duty of deciding on its admissibility being a duty which devolves on the court, it follows, necessarily, that the court must be satisfied that the confession was voluntary, before it can be permitted to go to the jury; in other words, that the burden of proof that it was voluntary devolves on the Commonwealth."

In *Nicholson v. State*, 38 Md. 140, after reviewing the authorities, the court said: "And we may add, that very great injustice might in some cases be done to the prisoner by allowing a confession made by him to be given in evidence before the court is satisfied that it was voluntarily made; for, as suggested in the appellant's brief, it would

be difficult for the jury, in deciding the question of admissibility, not to be influenced by the confession itself, which they ought not to hear unless its admissibility is first clearly established to the satisfaction of the court. Of course the credibility of the witness is a question for the jury to decide, in the same manner as they pass upon the credibility of other witnesses in the cause." The credibility of the witness is twice passed upon; first, by the court on the question of admissibility; and second, by the jury in weighing the testimony.

In *Washington v. State*, 53 Ala. 29, the court said: "Before any confession can be received in a criminal case it must be shown to the court that it was voluntary—that is, made without the appliance of hope or fear by any other person."

In *Owen v. State*, 78 Ala. 425, 6 Am. Crim. Rep. 206, the court said: "The rule is clearly settled in Alabama as elsewhere, that confessions cannot be given in evidence against a person charged with crime until they are first shown to the satisfaction of the court to have been voluntarily made." See also *Johnson v. State*, 59 Ala. 34, 3 Am. Crim. Rep. 256.

In *Regina v. Thompson*, 17 Cox, C. C. 641, 69 Law Term Rep. 24, 2 Q. B. 12, 9 Am. Crim. Rep. 269, one of the Crown Cases Reserved, decided in 1893, after reviewing the authorities, the court said: "If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask: Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

In *Regina v. Warningham*, 2 Den. 447, Baron Parke, addressing the counsel for the prosecution, says: "You are bound to satisfy me that the confession which you seek to urge against the prisoner was not obtained from him by improper means." Not being satisfied that such was the case, he rejected the evidence of the witness.

It will be observed that in *Regina v. Rose*, reported as one of the leading cases in this volume, page 275, Lord Russell, C. J., said: "It is to be borne in mind, not only by the magistrates, but by the prosecuting counsel, and by solicitors having charge of the prosecutions, that they must satisfy themselves, before putting a confession in evidence, that the confession was not obtained under such circumstances as to be inadmissible." A duty resting upon both court and prosecution, the performance of which each frequently endeavors to cast upon the other, leaving the prisoner at the mercy of the jurors with a police-confession thrust upon them, indorsed with the approval of both the court and the prosecuting attorney.

In a preliminary inquiry the following took place:

Q. Did you say to him that it would be better for him to make a full disclosure?

A. I don't know but that something of that kind might have been said.

Q. Do you know by whom?

A. I do not know.

Q. But by some one of you?

A. It may have been said.

Q. Isn't your impression that some such remark was made to him?

A. It is possible.

The confession was admitted and the defendant convicted, but the conviction was reversed; and, in reversing, the court said:

"The court below should have been satisfied that the confession was voluntary; certainly the preliminary testimony was of a nature to excite the gravest suspicion that improper inducements had been held out to elicit it. But the testimony affirmatively established the inadmissibility of evidence of the confession. It would be substituting sound for sense to say that the prosecuting witness did not in effect declare that the sheriff or his deputy, or he himself in their presence and hearing, said to the prisoner, 'It will be better for you to make a full disclosure.' The rule is without exception that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons." Later in the opinion the court said: "We cannot too strongly urge on the district attorneys never to offer evidence of confessions, except it has first been made to appear that they were made voluntarily. We ought not to be compelled to reverse a judgment because of a violation of so well established a rule of law." *People v. Barrie*, 49 Cal. 342, 1 Am. Crim. Rep. 178.

Mr. Taylor, in his *Law of Evidence*, recognizes this as a settled doctrine. In section 372 we find the following: "Before any confession can be received in evidence in a criminal case, it must be shown to have been *voluntarily* made; for,—to adopt the somewhat inflated language of Chief Baron Eyre,—'a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.' The material question, consequently, is, whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is—as we have seen—addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession."

A hasty reading of *Lefever v. State*, 50 Ohio St. 384, 35 N. E. Rep. 52, and *Rufer v. State*, 25 Ohio St. 464, would imply a contrary rule held in that State. In the *Lefever Case*, while holding that the defendant had a right to be heard upon the preliminary inquiry, the court gave as a reason, that in the *Rufer Case* the doctrine was announced that the burden rested upon the defendant, and, therefore, that the defendant had the right to introduce evidence to impeach the confession. In the *Rufer Case* the question arose as to whether or not the defendant had a right to *cross-examine* the witness offered to

prove a confession (and who had stated it to be a voluntary confession) previous to the introduction of the confession in evidence; and in discussing that question, without citing any authorities upon the subject, the court remarked that it devolved upon the defendant to prove that the confession was improperly obtained. It may well be doubted, whether, upon full argument, that court would adhere to the doctrine that was incidentally announced, when the exact proposition does not seem to have been discussed.

In the preliminary inquiry the defendant has the right both to cross-examine the witnesses offered to prove a confession and to introduce rebuttal testimony.—In *Biscoe v. State*, 67 Md. 6, 8 Atl. Rep. 571, the court said: "The prisoner also offered to prove by other witnesses that, prior to the interview at which the confession was made, Morgan had held out inducements to the prisoner to confess, and also what was said by Morgan at the time. This offer the court refused, saying at the time that, if it should appear in the subsequent progress of the trial that inducements were in fact held out to the prisoner, and that the confession was made in consequence of such inducements, the court would direct the confession to be stricken out. This was not, we think, the proper practice. Before permitting the witness to testify in regard to the confession, the court ought to have ascertained, first, whether any inducements at the time, or prior thereto, had been held out to the prisoner; and in the next place, whether he was influenced by such inducements in making the confession. The court may, it is true, rule out a confession, even after it has been admitted in evidence, if satisfied, in the subsequent progress of the case, that it was not a free and voluntary confession, and may instruct the jury that it is not to be considered by them in determining the question as to the guilt or innocence of the prisoner; but once in, it may have an influence more or less prejudicial against the prisoner. The preliminary question, therefore, as to its admissibility, is one which ought, in all cases, to be decided by the court before it is permitted to go before the jury. *Nicholson v. State*, 38 Md. 140."

In *Brown v. State*, 71 Ind. 470, in construing a statute, which provided as follows: "The confession of the defendant, made under inducements, where all the circumstances, may be given in evidence against him, except when made under influence of fear, produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony," the court said: "Under this statute, confessions made under inducements may be divided into two classes,—the first embracing all those made under inducement, except those made under the influence of fear produced by threats; and the second, all those made under the influence of fear produced by threats. Confessions of the first class may be given in evidence, with all the circumstances. Those of the second class are not competent to be given in evidence at all. It is with confessions of the second class that we have to deal in this case. It is a general, if not a universal, rule of the law that it is for the court to determine the competency of evidence; and the competency should be determined before the evidence goes to the jury, because, if incompetent,

it should not go to the jury at all. When the competency of evidence depends upon extrinsic facts, as, in this case, upon the question whether the confessions were made under the influence of fear, produced by threats, how can the court determine the question of competency without hearing the evidence offered on that subject? Doubtless, confessions of the defendant are *prima facie* competent; but when objection is made by the defendant to their competency, and evidence is offered by him in support of the objection, the court cannot determine the objection without hearing the evidence; nor can it relegate the question to the jury, for it is the duty of the court to pass upon it in the first instance, before the evidence can legally go to the jury. It seems to us clear, on principle as well as authority, that the court erred in refusing to hear the evidence offered by the defendant to show that the confessions were made under the influence of fear produced by threats. This view is supported by Whart. Crim. Ev. (8th ed.), § 689; *Com. v. Culver*, 126 Mass. 464."

In *Palmer v. State*, 136 Ind. 393, 36 N. E. Rep. 130, the sole ground of reversal was that the court below, while conducting the preliminary inquiry as to the admission of a confession, limited the defendant's right to cross-examination of the witness supporting the defendant's confession, and denied the defendant's right to introduce evidence to show that the confession was the result of fear, intimidation and threats.

In *State v. Platte*, 34 La. Ann. 1061, the court said: "It is elementary that the confession of an accused is not admissible against him unless it is a free and voluntary confession, and its character as such must be first shown, as a prerequisite to its admission. When the State offers to make such proof, the issue as to the character of the confession is properly raised, and both sides have the right to be heard on this issue. The inquiry, on a point of such vital importance to an accused, should be free and full, and is not to be closed at the very instant that the State manages to eke out from the prosecuting witness that she, the witness, had made no threats or promises, and all opportunity denied to the other party to be heard."

Another very interesting case upon this topic is that of *Commonwealth v. Culver*, 126 Mass. 464, published as a leading case in 3 American Criminal Reports, 81.

It is within the province of the jury to weigh all the evidence submitted to it in relation to a confession.—Although the jury must accept, for consideration, all evidence which the court admits as competent, no obligation rests upon the jury to believe any witness who testifies in support of an alleged confession, if, in the opinion of the jury, the testimony of such witness is of a doubtful character; for it is within the province of the jury to weigh the testimony and to pass upon the credibility of the witnesses; accordingly, the jury must accept the evidence as competent, but may reject the testimony as unworthy of belief. The testimony given upon the preliminary inquiry, being addressed to the court, should afterwards be given to the jury; hence, that which on a preliminary inquiry may impress the court as

truth, may fail to convince the jury; and that which is admitted as a subject for consideration may be rejected upon consideration.

Confessions obtained by threats or suggestions of favor, inadmissible.—The rule was announced in *State v. Roberts*, 12 N. C. 259, by Chief Justice Taylor, as follows: "The true rule is, that a confession cannot be received in evidence, where the defendant has been influenced by any threat or promise; for, as has been justly remarked, the mind, under the pressure of calamity, is prone to acknowledge indiscriminately a falsehood or a truth, as different emotions may prevail; and, therefore, a confession obtained by the slightest emotions of hope or fear ought to be rejected."

"If I tell you, won't you hurt me?" asked a negro girl of the constable who arrested her. The constable replied: "No, you shan't be hurt; I came here to arrest you and you shan't be hurt." She hesitated, repeated her inquiry, received the same promise, and then confessed, which confession being admitted in evidence, she was convicted; but the judgment was reversed upon the ground that the confession was inadmissible. *Earp v. State*, 55 Ga. 136, 1 Am. Crim. Rep. 171.

A negro boy about eighteen years of age, being arrested for burglary, and goods found in his possession being identified, his employer said: "Tom, this is mighty bad; they have got the dead wood on you, and you will be convicted," and advised the prisoner if he had anything to say to do so. The prosecutor said to the prisoner, "You are very young to be in such a difficulty as this; there must have been some one with you who was older; and I, if in your place, would tell you it was; it is not right for you to suffer the whole penalty, and let some one who is guiltier go free, that it might go lighter with him." The prisoner confessed, which confession was admitted in evidence at the trial; but the conviction was reversed. *Newman v. State*, 49 Ala. 9, 1 Am. Crim. Rep. 173.

This subject is very ably reviewed by the Supreme Court of the United States (*Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 10 Am. Crim. Rep. 547) by Mr. Justice White, who devotes about eighteen pages of the opinion to a review of the subject, citing many cases, both English and American. See also *Sparf et al. v. United States*, 156 U. S. 51, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168; *Queen v. Thompson*, 9 Am. Crim. Rep. 269; *Williams v. Commonwealth*, 27 Gratt. (Va.) 997, 2 Am. Crim. Rep. 67; *Flagg v. People*, 40 Mich. 706, 3 Am. Crim. Rep. 70; *State v. Tatro*, 50 Vt. 483, 3 Am. Crim. Rep. 165; *State v. Day*, 55 Vt. 510, 4 Am. Crim. Rep. 104; *People v. Stewart*, 75 Mich. 21, 42 N. W. Rep. 662, and the cases and notes in the present volume. The subject is treated of in 1 Greenleaf on Evidence, secs. 219-223, inclusive; in Roscoe's Criminal Evidence, pp. 29-38, inclusive; and in Wharton's Criminal Evidence, secs. 657-674, inclusive.

An illustrative case.—The following is the opinion in full in *Brown v. People*, 91 Ill. 506:

PER CURIAM: The accused was indicted for burglary, and on the trial he was found guilty, and sentenced to the penitentiary for the

period of one year. On looking into the testimony found in the record we are satisfied it does not warrant the conviction. Much of the testimony admitted against the objections of defendant was incompetent. The accused was advised to make a confession, and in attempting to do so he made several different statements, *all of which are shown by other testimony to be absolutely untrue.*

The verdict is so much against the weight of the evidence it ought not to be permitted to stand, and for that reason we have not deemed it necessary to consider the instructions given at the trial.

The judgment will be reversed and the cause remanded.

Judgment reversed.

From Roscoe's Criminal Evidence, page 29: "Three men were tried and convicted of the murder of a Mr. Harrison. One of them confessed himself guilty of the fact, under a promise of pardon; the confession, therefore, was not given in evidence against him; and a few years afterwards it appeared that Mr. Harrison was alive."

Undue influence once exerted is presumed to continue until the contrary clearly appears; accordingly, suggestions of favor, or threats once made, render confessions made upon subsequent days inadmissible.—In Barnes v. State, 36 Tex. 356, the court said: "The legal proposition that confessions made while under an arrest, induced by promises or threats, cannot be used in evidence against the party making them, has been too long definitely settled to now require argument or citation of authorities to sustain it. It is also quite well settled that, as a presumption of law, the influence of threats or promises once made continue to operate until rebutted by proof clearly showing that it had ceased to operate. Peter v. State, 4 Sm. & M. 31; Van Buren v. State, 24 Miss. 513; State v. Guild, 5 Halst. 163; State v. Field & Webber, 4 Tenn. 140."

The Supreme Court of Louisiana announced as an official syllabus to *State v. Mims*, 43 La. Ann. 532, 9 So. Rep. 113, the following:

1. Confessions of the accused will not be received against him unless they are voluntary.

2. When promises, offering an advantage to the accused, have been made to him in order to induce a confession by the prosecutor, and he invites him to call on him the next day, and the prosecutor does so, and without any invitation of the accused renews the same promises, whereupon the accused confesses, they will be regarded as one entire act, operating from the time the first inducements were offered to the accused.

Error in admitting an incompetent confession is not cured by a subsequent exclusion of it. It is error to permit the prosecuting attorney to cross-examine the accused as to an incompetent confession, and it is additional error to then permit the confession to be admitted as impeaching testimony.—So valuable as an authority on the above proposition is the case of State v. Shepherd et al., 88 Wis. 185, 59 N. W. Rep. 449, decided May 25, 1891, that we here give the opinion in full:

ORTON, C. J. The defendants were informed against, tried, convicted, and sentenced to imprisonment in the State prison for the

crime of robbery and stealing from the person of one Joseph Freedon the sum of \$20. As we understand the record, there are but two assignments of error: (1) The court admitted in evidence the confession of the defendant Joseph Shephard to the police officers while he was in custody in the common jail, and the evidence had its effect on the jury, and then the court excluded it as being a confession made under duress, and extorted by threats, promises, and by falsehood. The court should have determined whether the confession was admissible before it was given in evidence. (2) That the court, after having excluded the confession as incompetent, allowed the district attorney to cross-examine the defendant Shephard, who had offered himself as a witness, as to whether he made such confession, and, he having denied it, allowed evidence on behalf of the State to contradict the testimony of Shephard by evidence that he did make such confession, and the particulars thereof.

1. We are of the opinion that said first error is well assigned. The testimony was before the court as to the manner in which the confession had been obtained, and the court should have decided it as a preliminary question before admitting the whole confession in evidence. Every word of the confession was fastened on the mind of the jury, and had made its impression there against the accused. Its subsequent rejection by the court would not erase or remove that impression. It had produced its lasting effect upon the jury, and must have affected their verdict. The remarks of the learned judge in ruling upon the objections to the evidence were well calculated to deepen the impression already made by the evidence upon the minds of the jury. We cannot but think that this was a material error, and prejudicial to the accused.

2. The method here adopted to get the confession of Joseph Shephard in evidence, after it had been excluded by the court as being incompetent and inadmissible, by reason of its having been extorted by promises of immunity and threats of injury and by falsehood, was certainly very ingenious and plausible. It would seem as if it was made to fit the case of *Com. v. Tollifer*, 119 Mass. 313. It was this case that induced the court to admit the evidence. That was also a case of robbery, and by more than one defendant, and one of them made a confession to the officers in the jail. The testimony of the officer was first taken as to the manner in which the confession was obtained (and the manner was about the same as in this case), and the court ruled that the confession was incompetent, and should not be introduced in evidence. About the only difference from this case is that the jury did not hear the confession. It is to be regretted that the court did not follow that case in this respect. The case is not very fully reported, but the principle established seems to be that although the testimony of the confession was incompetent, yet, where the accused offered himself as a witness, he became such, as any other witness, and might be asked whether he made the confession, and, if he denies it, the confession itself might be proved to contradict him by way of impeachment. No other reason is given. The case is unsatisfactory, and we cannot follow it. The confession was rejected be-

cause it was extorted. It was unfair to the accused, and should not be proved against him, and is condemned by the court and ruled out. When the defendant was asked if he made that confession, and denied it, the same witnesses who extorted the confession, and whose testimony was disallowed on that account, are allowed to testify to the confession, however wickedly or wrongly it was obtained, on the exceedingly narrow theory that it is not admitted as a confession, but merely to contradict the witness. The confession is allowed to go to the jury, and have its effect in convicting the defendant, and override the ruling of the court that it was inadmissible as evidence against him, and for such a petty reason. The confession is just as objectionable as evidence, and as incompetent and hurtful, when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated, and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done directly, but it can be done indirectly. It cannot be used to convict, but it can be used to contradict the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust. This evidence was inadmissible on the familiar ground that a witness cannot be cross-examined and contradicted in respect to matters not admissible in evidence as part of the case. Whart. Cr. Ev., sec. 484. That confession first went to the jury, and produced its effect as evidence, before it was excluded by the court, and finally goes to the jury as competent evidence by way of contradicting the defendant. It seems impossible to keep it out, however objectionable or incompetent it was as evidence against the accused. That it was incompetent is not an open question in the case. The court so decided in favor of the defendants.

For the above errors the judgment must be reversed, and a new trial ordered. The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the State prison at Waupun is hereby ordered to deliver the defendants into the custody of the sheriff of the county of Ashland, to be held by him until they are discharged from his custody according to law.

The corpus delicti cannot be proved by a confession.—This proposition is sustained by sections 632-633, Wharton's Criminal Evidence, and cases there cited. One of the illustrations given by Mr. Wharton is the case of *Pitts v. State*, 43 Miss. 472. In that case the evidence showed that one James Magee died with symptoms which might indicate poisoning, congestion of the brain, or disease of the heart. The defendant confessed that he had prepared poison and sent it by another person to be administered to Magee. A conviction was had, but reversed because the *corpus delicti* was not proven by evidence, other than that of the confession.

The case of *State v. Dubois*, 54 Iowa, 363, 6 N. W. Rep. 578, is also a very interesting case upon this subject. The Iowa statute does not permit a conviction unless the *corpus delicti* be established by proofs

other than a confession of the defendant made out of court, which is substantially the re-enacting of the common law. The defendant was indicted for larceny, in that he found lost property and feloniously appropriated it to his own use. The owner had the money and notes in his possession a short time before the loss. He went to the sheriff to secure his services in finding the property, and in the presence of the defendant made statements in regard to the losing of the property and its value. This evidence was introduced apparently for the purpose of proving that the defendant being present and hearing the statements must be regarded as admitting them. It was also shown that the defendant admitted to various persons that he had found the property, and had even done so in one or two letters written to his brother. The Supreme Court said that the explanations given by the defendant were "extremely unsatisfactory," but reversed the case because there was no positive proof of a *corpus delicti*, the court saying: "Our views and conclusions are based upon the most familiar principles of the law. We cannot hesitate to apply them in this case, though there is reason to fear that, by their application in this instance, a guilty man escapes punishment. But however strong may be our belief of defendant's guilt, we cannot overturn the law to sustain his conviction. By so doing, justice would be more gravely offended than by his escape from punishment, by the failure of the prosecution to produce legal evidence that an offense had been committed."

In *Williams v. People*, 101 Ill. 382, the court adhered to this doctrine, saying: "This rule is fully recognized by the ablest text-writers of the day and the general current of authority."

Confessions which are vague should be refused.—This applies with special force to those made through an interpreter whose knowledge of the foreign language is imperfect. *Serpentine v. State*, 1 How. (Miss.) 256.

Treatment of the prisoner while under arrest.—It is a common occurrence, in large cities, when a person is arrested for some offense, where the evidence is not clear and manifest, to detain him for hours, and it may be for days, in a police station before bringing him to a magistrate. This is indulged in for the purpose of working up the case, or, in other words, obtaining a confession. Both at common law and by the statutes of many, if not all, of the States in this country, it is the duty of an officer to take a prisoner to a magistrate immediately; and it is for the magistrate to determine what continuance, if any, shall be allowed. Sir Matthew Hale said: "When the officer or minister has made his arrest, he is forthwith to bring the parties to the gaol, or to the justice, according to the import of the warrant. But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick and not able at present to be brought, he may, as the case shall require, secure him in the stocks, or in case the quality of the person or the indisposition so require, secure him in a house till the next day, or such time as it may be reasonable to bring him." 2 Hale, Pleas of the Crown, 119.

Section 7, division 6, of the Illinois Criminal Code, provides as fol-

lows: "When an arrest is made without a warrant, either by an officer or private person, the person arrested shall, *without unnecessary delay*, be taken before the nearest magistrate in the county, who shall hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrests upon warrants." Notwithstanding the provisions of this statute, it is but usual for Chicago police to imprison persons for days before bringing them before a magistrate, during which time the arts and tricks of detectives are skilfully applied. Any confession obtained under such circumstances should be presumed to be involuntary. The same doctrine should apply to all other States where the common law or similar statutes are in force.

The case of *Wright v. Court et al.*, 6 Dowl. & Ry. 623, heard in 1825, is a leading case upon this subject. It was a suit for false imprisonment, it being averred in the declaration that the plaintiff was imprisoned on a false charge of felony for three days by the defendants, who then handcuffed him and took him before a magistrate and there imprisoned him again for twelve hours. A plea of not guilty and also special pleas were filed to the declaration. By the special pleas it was contended that a felony had been committed on the premises of one Clarke. Plaintiff being suspected of being concerned in the felony was arrested, and that the defendant Court, being a constable, the other defendants assisting, imprisoned the plaintiff for the space of time alleged, in order to carry him before a magistrate, the same being reasonable, for the purpose of informing Clarke of the arrest, etc., and enabling Clarke to procure necessary evidence and witnesses for the prosecution; and that they handcuffed the plaintiff in order to prevent his escape, etc. Upon demurrers to the special pleas the court gave the following opinion:

BAILEY, J. "It is difficult to imagine any circumstances under which the conduct of these defendants could be justifiable in point of law, but at all events the circumstances set out in this record are wholly inadequate to furnish them with any justification. The plaintiff alleges that he was first imprisoned for three days, and the defendants by their first special plea admit that he was imprisoned for that space of time before he was taken to a magistrate for examination, and aver that it was a reasonable time for that purpose, and for the purpose of enabling Clarke to collect and bring forward evidence in support of the charge of felony. In the first place, it was a most unreasonable time for any purpose, and in the second place, the latter purpose was perfectly illegal. It is the duty of every person who arrests another on suspicion of felony, to take him before a magistrate as soon as he reasonably can (Com. Dig., Imprisonment, H. 4); and even a magistrate is not authorized by law, and much less a constable, therefore, to detain a person so arrested, except for a reasonable time, and except for the purpose of his being examined. Com. Dig., Imprisonment, H. 5. The magistrate might have been justified in ordering the plaintiff to be detained until Clarke could bring forward his evidence, but without his order, the defendants could not possibly be justified in detaining him for any such purpose. The defendants have also justified the handcuffing the plaintiff in order to prevent his es-

escape; but they have not averred that it was necessary for that purpose, or that he had attempted to escape, or that there was any danger of his escaping; and such a degree of violence and restraint upon the person cannot be justified even by a constable, unless he makes it appear that there are good special reasons for his resorting to it. For these reasons the special pleas are clearly insufficient, and the plaintiff is entitled to our judgment." Holroyd, J., and Littledale, J., concurred. Judgment for the plaintiff.

STATE v. KING.

104 Iowa, 727—74 N. W. Rep. 691.

Decided April 6, 1898.

CONSPIRACY: *Ingredients* — *Approval distinguished from participation.*

1. A conspiracy implies a combination of two or more persons to accomplish an unlawful purpose of some kind; and contemplates the union of the energy of its different members to effectuate its purposes.
2. There must be proof of concert of action, understanding or agreement among its members.
3. The mere knowledge, acquiescence or approval of an act, without co-operation or agreement to co-operate, is not enough to constitute the crime of conspiracy.
4. Where defendant, among a number of persons, expressed satisfaction at the threat of another to punish a common enemy of theirs, who had assaulted him, and said that the assailant's fine would be paid, yet subsequently advised the assailant not to injure the person, and after the assault he referred to the injured party's assault upon himself, and said that he would pay the fine, *held*, that this did not render the defendant guilty of conspiracy to commit the assault.

Charles L. King, convicted of conspiracy, in the District Court of Buchanan County, before A. S. Blair, Judge, appeals. Reversed.

No arguments

LADD, J. The indictment charged the defendant and one De Wald with the crime of conspiring and confederating together with malicious intent wrongfully to injure the person of J. H. Willey, and that they did, in pursuance thereof, inflict on him great bodily injury. It appears that just after noon of

September 22, 1896, De Wald met Willey near Littell's store, in Independence, knocked him down, and so beat him that he was unconscious for several days. King did not touch Willey, but the theory of the State at the trial was that the assault and battery was the result of a criminal conspiracy between him and De Wald. The evidence shows that Raymond, De Wald, King, and others were in Reisner's saloon. Raymond asked King about the scar on his nose, and the latter responded that Willey had struck him with his cane. De Wald then remarked he had a grievance against Willey, and intended to whip him at the first opportunity; that Willey had published an article in his paper to the effect that, if his (De Wald's) circulation was cut short, it would be a good thing for the community. Something was then said about the payment of the fine, and King stated that, if he licked Willey, his fine would be paid, and related that Farwell, a partner of Willey, had said he would pay it, if some one would whip him. This state of facts is testified to by Raymond, De Wald, and King, but Mullick says King told De Wald that he would pay his fine. This witness, however, is unable to recall anything else in the conversation. De Wald and King are uncontradicted in the statement that the former answered that he did not want anybody to pay his fine. De Wald repeated that he would punch Willey in the face, and whip him in good shape. Both Raymond and King advised him not to punch or kick Willey, but that he might as well slap his mouth, or something of that kind. De Wald, after leaving the saloon, said to several that he was going to whip Willey, and that Raymond and King were to pay the fine. King left the saloon, and was on his way to order a team at the livery-stable, with which to take a political orator to Winthrop, when he saw people gathering as he approached. One Tapper called to De Wald not to strike a man when he was down, and King replied to this remark, "No interfering," and spoke of Willey's assault on him, and mentioned the fact that he was a cripple. We have set out this evidence with particularity, because of the ruling on the motion to direct a verdict for defendant at the conclusion of the State's evidence, and also after both parties had rested. The evidence does not establish the conclusion that the defendant was guilty of the offense charged.

The usual definition of "conspiracy" is "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal by criminal or unlawful means." 2 McClain, Crim. Law, 953; 2 Bishop, Crim. Law, 592; *State v. Jones*, 13 Iowa, 269; *State v. Potter*, 28 Iowa, 554; *State v. Stevens*, 30 Iowa, 391; Code, sec. 5059. There is no proof of any concert of action, or of any understanding or agreement therefor. The mere knowledge, acquiescence, or approval of an act, without co-operation or agreement to co-operate, is not enough to constitute the crime of conspiracy. 2 McClain, Crim. Law, 968; *Evans v. People*, 90 Ill. 384; *Miles v. State*, 58 Ala. 390; 2 Bishop, Crim. Law, 181, 183; *State v. Cox*, 65 Mo. 29; 2 Wharton, Crim. Law, 1341. The combination must contemplate the accomplishment of the purpose by the united energy of the accused, or active participation must be shown. The testimony, at most, shows King not superior to the ordinary instincts of human nature. He was smarting under an assault from Willey, and was willing the latter should be humiliated by a stroke on the mouth from the palm of the hand; but he entered into no arrangement that this should be done, and suggested it only, instead of the beating De Wald was insisting he would inflict. His suggestion was not acted upon. King neither agreed to do nor did anything to aid in carrying out the unlawful purpose of De Wald. The payment of the fine, if promised, as stated, by Mullick, constituted no part of the offense. The statement was made to Tapper just as De Wald withdrew from beating Willey, and indicated his satisfaction with what was done, rather than any intention of affording aid or comfort. It was not made until the encounter was ended. The court, in the twelfth instruction, correctly stated the law, in language which ought not to have been misunderstood. After cautioning the jurors not to confuse the crime charged with that of assault and battery, or one of a similar nature, they are told not to convict the defendant unless "he agreed to participate in the commission of such offense in concert and combination with the said Bert De Wald, or that he aided in it by advising and counseling the act, and promising De Wald immunity from punishment therefor, and in any manner aided in its commission at the time and

place where it was committed. A mere passive cognizance or consent to an illegal act or commission of an unlawful offense is not sufficient to sustain the charge of conspiracy." Under the evidence and the law as given in this instruction the defendant was entitled to an acquittal. Reversed.

HERDMAN V. STATE.

54 Neb. 626—74 N. W. Rep. 1097.

Filed April 21, 1898.

CONTEMPT: *Procedure—Affidavit.*

1. A proceeding against a party for contempt is in the nature of a prosecution for a crime, and the rules of strict construction applicable in criminal proceedings are governable therein.
2. The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution for a crime.
3. The statements must be as of the personal knowledge of the affiant. They may not be on information and belief.
4. The affidavit in such a proceeding is jurisdictional.

Error to the District Court for Douglas County; Hon. C. R. Scott, Judge. Reversed.

Guy R. C. Read and *William F. Gurley*, for the plaintiff in error.

C. J. Smyth, Atty. Gen., and *Ed. P. Smith*, Deputy Atty., for the State.

HARRISON, C. J. By a petition in error a review is sought of a judgment of the district court of Douglas county whereby the plaintiff in error was adjudged guilty of a contempt of court and to be punished therefor. The affidavit filed in the district court, the basis of the proceedings there, was as follows:

<p>"William W. Cox, Plaintiff,</p> <p style="text-align: center;">v.</p> <p>Board of Fire and Police Commissioners,</p> <p style="padding-left: 40px;">Frank E. Moores et al., Defendants.</p> <p>STATE OF NEBRASKA, } ss.</p> <p style="padding-left: 40px;">Douglas County. }</p>	}	<p>Doc. 60. No. 313.</p>
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"R. H. Olmsted, being duly sworn, deposes and says he is one of the attorneys for the plaintiff in the above entitled ac-

tion, and comes now and represents to the court that the restraining order issued herein on July 16, 1897, has been violated by the defendant R. E. L. Herdman in this, to wit: That on September 29, 1897, the said Herdman, as a member of the board of fire and police commissioners of the city of Omaha, Nebraska, did, as affiant is informed and believes, vote 'yes' at a meeting of said board on a resolution then adopted by said board removing plaintiff herein from the police department of the city of Omaha; that thereafter, on the 1st day of October, 1897, at a special meeting of said board, the following proceedings were had, and the following is a copy of the journal of said board showing a record of the proceedings then and there had:

“ ‘OMAHA, Neb., October 1, 1897.

“ ‘The board met pursuant to call. Present, Commissioner Gregory in the chair, and Commissioners Peabody, Bullard, and Herdman; absent, Commissioner Moores.

“ ‘The secretary presented a communication from the chief of police addressed to Hon. C. R. Scott, with the reply of his honor thereto attached, and reading as follows:

“ ‘“Hon. C. R. Scott, Judge District Court, Omaha, Neb.—
Dear Sir: I have the honor to inclose herewith a resolution adopted by the board of fire and police commissioners at the meeting of that body held last night. It was the sense of the board and also my personal opinion, that, in so far as the said resolution affected Chief of Detectives W. W. Cox, your attention should be called to it, as the board and myself desire to be guided by both the letter and spirit of the restraining order made by your honor in the matter of W. W. Cox v. The Board of Fire and Police Commissioners.

“ ‘“I am sure that the form of my communication to your honor is strictly in accordance with legal practice in such cases; but I simply seek to convey to your honor the meaning and intention of the board touching the matters mentioned herein, and we would be glad to be guided by such advice and instructions as you may deem consistent to give in the premises.

“ ‘“Very respectfully yours,

“ ‘“C. V. GALLAGHER, Chief of Police.”

“ “ Reply:

“ “ *Chief Gallagher:* You are notified that the action of the board of fire and police commissioners respecting the discharge of Chief of Detectives Cox, in discharging him from the service, is in direct conflict with the restraining order issued by me, and should be rescinded at once. Until the case is heard no such action should be taken by the board.

“ “ (Signed) CUNNINGHAM R. SCOTT, Judge.

“ “ Omaha, Sept. 30, 1897.”

“ “ On motion, the communications were ordered spread upon the record and placed on file, and the following resolution was passed, Commissioners Peabody, Gregory, and Bullard voting in the affirmative, Commissioner Herdman in the negative:

“ “ *Resolved,* That the order removing certain officers and patrolmen, passed September 29th, be, and is hereby, modified in so far as it relates to one W. W. Cox, and it is ordered that as to him the said order be, and is hereby, rescinded.

“ “ On motion, the board then adjourned.

“ “ Secretary.”

“Affiant further says that he is informed and believes that the said R. E. L. Herdman is the secretary of the said board of fire and police commissioners, and was the person who, as secretary, presented the first two aforesaid communications to the said board at its meeting held October 1, 1897.

“Affiant further says that the aforesaid proceedings of the said board of October 1, 1897, have been personally examined by him and the foregoing are true copies thereof as appears in Journal F at pages 148 and 149 of the records of said board. And further affiant saith not.

“ R. H. OLMSTED.

“ Subscribed and sworn to before me this 4th day of October, 1897.

“(Seal.)

FRANK L. MCCOY,

“ Notary Public.

“ My commission expires January 22, 1899.”

That this was insufficient was raised during the proceedings and is presented by the petition in error and is one of the points urged in the brief filed for plaintiff in error. It is the doctrine of this court that proceedings for constructive contempt

are in the nature of prosecutions for crimes, and as much certainty is required in a statement of acts of which complaint is made as in the statements of offenses in prosecutions under the provisions of the Criminal Code. *Gandy v. State*, 13 Neb. 445; *Boyd v. State*, 19 Neb. 128; *Johnson v. Bouton*, 35 Neb. 903; *Percival v. State*, 45 Neb. 741; *Hawes v. State*, 46 Neb. 149; *Cooley v. State*, 46 Neb. 603; *O'Chander v. State*, 46 Neb. 10. The affidavit in such a proceeding is jurisdictional. *Gandy v. State*, 13 Neb. 445; *Ludden v. State*, 31 Neb. 437; *Hawthorne v. State*, 45 Neb. 871. The affidavit must state positive knowledge; if on information and belief, it is insufficient. *Ludden v. State*, *supra*; 4 Ency. Pl. & Pr. 779, 780; *Gandy v. State*, *supra*; *Freeman v. City of Huron* (S. Dak.), 66 N. W. Rep. 928; *Thomas v. People* (Colo.), 23 Pac. Rep. 326. Viewed in the light of these well established rules, the affidavit, the basis of the proceeding against plaintiff in error, was wholly insufficient. Some of its most important statements were on information and belief. There is no statement of the substance, or any of the terms, of the order of which it is asserted there had been a violation, nor is there any statement that the party to be cited for contempt in its violation had any notice of its making or existence; in short, the affidavit was so lacking in requisite statements of substance as to be fatally defective. It follows that the judgment must be reversed and the prosecution dismissed. Reversed.

NORVAL, J. I concur in reversal of the judgment on the grounds that the evidence adduced on the trial is insufficient to sustain the judgment and sentence imposed by the district court.

NOTES (by J. F. G.).—While the general reasoning of the court, as to the sufficiency of an affidavit that can be made the basis of a contempt proceeding, is correct, the case, unless controlled by statute, is rather that of civil than criminal contempt. (See notes to *Carter v. Commonwealth*, in present volume, p. 318.)

The affidavit, being made by an attorney, is subject to additional criticism. In *Spencer v. Kennard*, 12 Tex. 180, the court said: "We trust that it is not insisted that counsel should represent their clients in making affidavits. Surely this is not believed to constitute any part of the duty of counsel to their client. The ends of justice sometimes make it necessary that an attorney should give evidence for his client,

but it should always be regarded by counsel as a misfortune to be placed in a such a position, and courts should extend no countenance to the practice, and only tolerate it in cases of pressing necessity. See also *Drach v. Camberg*, 187 Ill. 385; *Ross v. De Los*, 45 Ill. 447; *Frear v. Drinker*, 8 Pa. St. 521. It has been held that when an attorney makes an affidavit even in the positive form, it is to be presumed to have been made on information and belief. (See the closing portion of the notes to *Lippman v. People*, in the present volume, p. 356.)

Affidavits made in the positive form will be construed to have been made on information and belief, if the context would so indicate.—This doctrine has been announced in *Hart v. Grant*, 8 S. D. 248, 66 N. W. Rep. 622, and *Finlay et al. v. De Castroverde*, 22 N. Y. S. 716, in each of which cases a *capias* in a civil case was quashed for that reason. In the latter case the court said:

"It is urged upon the part of the defendant that the motion to vacate the order of arrest should have been granted, because many of the material allegations of the affidavit upon which the order of arrest was founded were made upon information and belief, and derived from documents which were not produced, and that the allegations in the affidavit are simply conclusions derived from an inspection of these documents, which it is the province of the court to draw, and not of the affiant. Upon the other hand, it is claimed by the respondents that the affidavit is not upon information and belief, nearly all the essential facts being within the knowledge of the affiant, and stated positively. It is asserted that the making of the agreement, the shipping of the merchandise, the receipt thereof by the defendant, and the acknowledgment of such receipt, were all facts within the knowledge of the plaintiff who made the affidavit. How the affiant, at New York, had personal knowledge of the receipt of these goods in Mexico, it is somewhat difficult to imagine. It may be that he believes they were received because he believes himself to have been informed by a letter of the defendant that he had received them, but he clearly had no personal knowledge of the fact. The only information that he claims to have had upon that point is the letter of the defendant acknowledging its receipt. Now, it is clear that if he was testifying upon the stand as a witness with respect to the receipt of these goods, he could not be heard to open his mouth without the production of the letter, or accounting for its loss. Hence, when we consider the difference between the allegations of a complaint and an affidavit, the former being allegations of fact, to be supported by evidence to be subsequently given, if not admitted, and the other furnishing the evidence to the court from which it can draw its own conclusions, it is apparent that allegations of this character, without the production of the proof, have no probative force whatever."

CARTER v. COMMONWEALTH.

96 Va. 791—32 S. E. Rep. 780, 45 L. R. A. 310.

Decided March 16, 1899.

CONTEMPT: Insufficient disclaimer—Jury trial—Statute void—Inherent power of courts.

1. It is contempt of court for a party litigant, when notified by his counsel to attend court for trial, to falsely telegraph to his counsel that he is seriously ill and cannot attend.
2. A mere disclaimer of wrongful intention is not sufficient, when the improper motive is manifest from the act.
3. The power to punish for contempt of court is a vital, necessary and inherent protective function of the court; and, while it may to some degree be regulated by statute, the legislature has no power to transfer from the court to a jury the right to determine the matter and to fix the penalty.

Error to a judgment for contempt of court rendered April 14, 1898, by the Circuit Court of the City of Lynchburg. Affirmed.

E. W. Saunders and *J. E. Edmunds*, for the plaintiff in error.
A. J. Montague, Atty. Gen., for the Commonwealth.

KEITH, P. At its November term, 1897, the circuit court of the city of Lynchburg issued a rule against Carter, plaintiff in error, to appear before it on the first day of the next term to show cause why he should not be fined and attached for contempt, by attempting to obtain a continuance of the action of Grubbs against Carter by means of false telegrams. In answer to this rule, he appeared and stated that he is a resident of the county of Nottoway, and that, having received a telegram from his attorney, J. Emory Hughes, that his case was pending, and that he must come to Lynchburg on the next train, he wired in response, "Sick with typhoid fever, and can't come;" that this statement as to his health was false, and made without due consideration; that he had no idea of interfering with or impeding the course of justice; that he did not make the statement for the purpose of obtaining a continuance, and nothing was farther from his mind; that no disrespect to the court was intended; and he prays that his fault may be overlooked.

When the matter came up for trial, Carter asked to be tried by a jury, which motion the court overruled, and, deeming his answer insufficient, entered a judgment against him for a fine of \$25 and costs, and that he be imprisoned for the term of two days in the jail of the city of Lynchburg, and afterwards, until he pays his fine and costs: provided, that this latter period shall not exceed two months. To this judgment, Carter obtained a writ of error from one of the judges of this court, and the errors assigned by him are: First, that upon the facts as shown in the record he was not guilty of a contempt; secondly, that the court erred in refusing to have a jury impaneled for his trial.

We are of opinion that, upon the facts shown, Carter was guilty of a contempt. The effort to obtain a continuance of his cause by means of a statement as to his health, which he knew to be false, tended directly to impede and obstruct the administration of justice. It is true that with respect to conduct or language, where the intent with which a thing is said or done gives color and character to the act or words, a disclaimer of any purpose to be guilty of a contempt, or to destroy or impair the authority due to the court, is a good defense (Rapalje on Contempt, § 115); but this is true only of language or acts of doubtful import, and which may reasonably bear two constructions. In the case before us there could have been but one motive, and that to influence the action of the court with respect to a case before it by means of a statement known and admitted to be false. We pass, therefore, to the consideration of the next error assigned. This presents a question of the utmost gravity, which has been argued with the ability which its importance demands, and has received from us our best consideration.

By an act of assembly passed in 1830-31 (see Session Acts, p. 48), the legislature undertook to enumerate and to classify contempts of court, and to prescribe the manner in which they should be punished. This act appears in the Code of 1849 as sections 24 and 25, ch. 194, as follows:

"Sec. 24. The courts and the judges, and justices thereof, may issue attachments for contempts, and punish them summarily, only in the cases following:

"First, misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice.

"Secondly, violence or threats of violence to a judge, justice or officer of the court, or to a juror, witness or party going to, attending, or returning from, the court, for or in respect of any act or proceeding had, or to be had, in such court.

"Thirdly, misbehavior of an officer of the court, in his official character.

"Fourthly, disobedience or resistance of an officer of the court, juror, witness or other person, to any lawful process, judgment, decree or order of the said court.

"Sec. 25. No court shall, without a jury, for any such contempt as is mentioned impose a fine exceeding fifty dollars, or imprison more than ten days. But in any such case the court may impanel a jury (without an indictment, information or any formal pleading) to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict."

This act was continued in force, without amendment, until the session of 1897-98, p. 548, when it was amended so as to read as follows:

"1. Be it enacted by the general assembly of Virginia, that section three thousand seven hundred and sixty-eight of the Code of Virginia be amended and re-enacted so as to read as follows:

"Sec. 3768. The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases, which are hereby declared to be direct contempts, all other contempts being indirect contempts.

"First. Misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

"Second. Violence or threats of violence to a judge or officer of the court or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court.

"Third. Misbehavior of an officer of the court in his official character.

"*Fourth.* Disobedience or resistance of an officer of the court, juror or witness to any lawful process, judgment, decree or order of the said court.

"When the court adjudges a party guilty of a direct contempt it shall make an entry of record, in which shall be specified the conduct constituting such contempt and shall certify the matter of extenuation or defense set up by the accused, and the evidence submitted by him and the sentence of the court.

"SUBSECTION.

"*Proceedings in Cases of Indirect Contempt.* Upon the return of an officer on process, or upon an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person may be arrested and brought before the court, and thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt, shall be filed, and the accused required to answer the same, by an order which shall fix the time therefor and also the time and place for hearing the matter. A copy of this order shall be served upon the accused, and upon a proper showing the court may extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt.

"After the answer of the accused, or if he fail or refuse to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed according to the rules governing the trial of criminal cases, and the accused shall be entitled to compulsory process for his witnesses and to be confronted with the witnesses against him.

"Such trial shall be by the court, or, upon the application of the accused, a trial by a jury shall be had, as in any case of a misdemeanor.

"If the jury find the accused guilty of contempt they shall fix the amount of his punishment by their verdict.

"The testimony taken on the trial of any case of contempt shall be preserved on motion of the accused, and any judgment of conviction therefor may be reviewed on writ of error from the circuit court having jurisdiction, if the judgment is by a county

court, or on writ of error from the supreme court of appeals, if the judgment is by a circuit or corporation court. In the appellate court the judgment of the trial court shall be affirmed, reversed, or modified as justice may require. If the writ of error to the judgment of a county court is refused by the circuit court having jurisdiction, application may then be made to the court of appeals.'

"2. All acts and parts of acts, so far as they conflict with this act, are, to that extent, hereby repealed."

Being of opinion that the defendant was guilty of contempt, we shall not attempt any classification of it as a direct or indirect contempt. If it were a direct contempt, then its punishment was without doubt to be ascertained and fixed by the court, without the intervention of a jury, by the terms of the law which the plaintiff in error himself invokes. If it were a contempt not within that classification, then it is incumbent upon us to consider whether it was within the power of the legislature to deprive the court of jurisdiction to punish it without the intervention of a jury.

Counsel for plaintiff in error insist that the question has already been decided by this court in the case of *Commonwealth v. Deskins*, 4 Leigh, 685, and again in *Wells v. Commonwealth*, 21 Grat. 500.

The latter case may be disposed of by the statement that this court reversed the judgment of the circuit court upon the facts, and held that the acts proved against Wells did not constitute a contempt of court.

With respect to the case of *Deskins v. Commonwealth*, it appears that it arose and was decided under the constitution of 1829-30. In the fifth article of that instrument it is provided that "the judicial power shall be vested in a supreme court of appeals, in such superior courts as the legislature may from time to time ordain and establish, and the judges thereof, in the county courts, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in corporation courts, and in the magistrates who may belong to the corporate body. The jurisdiction of these tribunals, and of the judges thereof, shall be regulated by law."

The constitution did not create the courts nor clothe them

with jurisdiction, but the courts themselves were established by the legislature, and their jurisdiction was regulated by law. In this respect the constitution of 1829-30 was only less general in its terms than the first organic instrument adopted in 1776.

The constitution of 1851 (art. VI, § 1), with respect to the judiciary department, provides: "There shall be a supreme court of appeals, district courts, and circuit courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law."

Art. VI, sec. 1, of the constitution now in force provides: "There shall be a supreme court of appeals, circuit court and county courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law." In a subsequent portion of the instrument, corporation courts are also provided for the cities of the State. These courts do not derive their existence from the legislature. They are called into being by the constitution itself, the same authority which creates the legislature and the whole framework of State government.

What was the nature and character of the tribunals thus instituted? Our conception of courts, and of their powers and functions, comes to us through that great system of English jurisprudence known as the "common law," which we have adopted and incorporated into the body of our laws.

That the English courts have exercised the power in question from the remotest period does not admit of doubt. Said Chief Justice Wilnot: "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the Supreme Court of Justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if

I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posteriority to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury. It is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other. Campbell's Lives of Chief Justices, 153.

In *United States v. Hudson*, 7 Cranch, 32, it was held that "certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the State is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute."

In *Wells v. Commonwealth*, 21 Grat. 503, it was said: "The power to fine and imprison for contempt is incident to every court of record. The courts, *ex necessitate*, have the power of protecting the administration of justice, with a promptness calculated to meet the exigency of the particular case."

It is unnecessary, however, to multiply authority upon this point, for we understand it to have been conceded by counsel for plaintiff in error that the power to punish contempts is inherent in all courts; but the contention is that it may be regulated by legislative action, and we are prepared to concede that it is proper for the legislature to regulate the exercise of the power so long as it confines itself within limits consistent with the preservation of the authority of courts to enforce such respect and obedience as are necessary to their vigor and efficiency.

Now, the contention of the plaintiff in error is that the act here punished was not a contempt under the statute of 1830-31, and that in order to hold it punishable summarily, it is neces-

sary to hold that the statute referred to is unconstitutional. There has been no adjudication upon that statute, to our knowledge, since the adoption of the constitution of 1851; for in the case of *Wells v. Commonwealth*, *supra*, Wells was, as we have seen, acquitted of the offense. So far, therefore, as the statute is to be considered as declaratory of the powers existent in the court established by the constitution, it is free from objection; so far as it is a reasonable regulation of the power vested in the courts, we have no disposition to question it; but if it is to be construed as a negation of the power of the court to punish a contempt, whether by excluding it from its enumeration and classification of acts which may be summarily dealt with by the court, or by taking from the courts the power to punish at all those acts enumerated as contempts, we are constrained to hold that the legislature has transcended the powers prescribed to it by the constitution.

It was contended by counsel for plaintiff in error that, inasmuch as the act of 1897-98 merely transferred the punishment of contempts from the court to a jury, and even made acts punishable as contempts not embraced within the act of 1830-1831, that it was not obnoxious to the objection that it interfered with or diminished the power of the court to protect itself.

To this view we cannot assent. It is not a question of the degree or extent of the punishment inflicted. It may be that juries would punish a given offense with more severity than the court; but yet the jury is a tribunal separate and distinct from the court. The power to punish for contempts is inherent in the courts, and is conferred upon them by the constitution by the very act of their creation. It is a trust confided and a duty imposed upon us by the sovereign people, which we cannot surrender or suffer to be impaired without being recreant to our duty.

Upon the point made by counsel for plaintiff in error, that the offense under consideration, if not embraced within the category of direct contempts by the act of 1897-98, neither was it by that of 1830-31, we cannot do better than to quote the language of the Supreme Court of Arkansas, in *State v. Morrill*, 16 Ark., at page 390:

"The legislature may regulate the exercise of, but cannot

abridge, the express or necessarily implied powers granted to this court by the constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the government of the American people.

"As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect; but to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department, because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt."

Reliance was placed by counsel for plaintiff in error upon a class of cases of which *Ex parte Robinson*, 19 Wall. 505, may be considered typical. In that case Robinson had in the most summary manner, without the opportunity of defense, been stricken from the roll of attorneys by the district court for the Western district of Arkansas. He applied to the Supreme Court for a *mandamus*, which is the appropriate remedy to restore an attorney who has been disbarred, and that court held, Mr. Justice Field delivering the opinion, that: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called

into existence, and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831," and the court declared that there could be no question as to its application to the circuit and district courts. "These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

Turning to the constitution of the United States, we find that it declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." This language is the equivalent of that found in our constitution prior to that of 1851, hereinbefore quoted. The inferior Federal courts and their jurisdiction are the creatures of Congress, and not of the constitution.

It may be remarked, also, with respect to the case of *Ex parte Robinson*, that the United States statute of 1831, while it carefully enumerates the subjects for which courts may punish summarily for contempt, that enumeration is so comprehensive as to afford complete protection to the courts in the performance of their duties, and contains no limitation whatever upon the power to punish in the enumerated cases; and that, while punishment which courts may inflict is limited to fine and imprisonment, their discretion is without limit as to the amount of the fine or the duration of the imprisonment. The courts of the United States will never be embarrassed by the decision in *Ex parte Robinson*; for, while the power to disbar an attorney is denied in that case as a proper punishment for contempt, the jurisdiction of the courts to disbar, after citation to appear and notice of the ground of complaint against, and an opportunity for explanation and defense, is fully recognized.

It were an unprofitable task to attempt to review within the limits of an opinion all the adjudged case to which our attention has been called, and which, with very many others, have been considered by us. For the benefit of those who may feel

themselves moved to a further investigation of this subject, we cite, without comment, the following cases:

State v. Frew, 24 W. Va. 416; *Hale v. State*, 45 N. E. 199; *In re Shortridge*, 99 Cal. 526, 34 Pac. 227; *Storey v. People*, 79 Ill. 45; *Holman v. State*, 105 Ind. 513, 5 N. E. Rep. 556; *State v. Knight*, 3 S. D. 509, 54 N. W. Rep. 412; *State v. Gal- loway*, 5 Cold. 326; *Little v. State*, 90 Ind. 338; *Baldwin v. State*, 126 Ind. 24, 25 N. E. Rep. 820; *Arnold v. Com.*, 80 Ky. 300; *Ex parte Crenshaw*, 80 Mo. 447; *Hughes v. People*, 5 Colo. 445; *Wyatt v. People*, 17 Colo. 252, 28 Pac. Rep. 961; *Langdon v. Wayne*, 76 Mich. 367, 43 N. W. Rep. 310; and *Ex parte Schenck*, 65 N. C. 353.

In public apprehension, the legislature is deemed in a peculiar sense the agent and representative of the people. It is true, it constitutes the most numerous branch of the government, and the brief terms for which its members are elected, and the fact that they are directly voted for by the people, give color to and encourage this opinion; but a moment's reflection should serve to dispel it. In our system of government all power and authority are derived from the people. They have seen fit, by organic law, to distribute the powers of government among three great co-ordinate departments,—the executive, the legislative, and the judicial. The constitution of the State, which is the law to all, declares in the seventh section of the first article that "the legislative, executive, and judiciary powers should be separate and distinct." This is a quotation from the Bill of Rights,—an instrument which should never be mentioned, save with the reverence due to the great charter of our liberties. Of such importance is this principle deemed that it is repeated and constitutes a distinct article, which declares that "the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others; nor shall any person exercise the power of more than one of them at the same time, except as hereinafter provided." Whoever, therefore, belongs to either one of these great departments is an agent and servant of a common master; and each and all represent a part of the sovereignty of the State, so long as they move within the ap-

appropriate spheres prescribed to them by the organic law. A court, and the judge thereof, is as much an agent and servant of the people as any other officer of government, and he is bound by the duty and obligation which he owes to the Commonwealth to cherish, defend, and transmit unimpaired to his successors the office with which the Commonwealth has seen fit to honor him. A judge, therefore, in vindicating the dignity and authority of the court over which he presides, is discharging a solemn duty owed in his official character, and is not engaged in a personal and private controversy.

Speaking upon this subject, the Supreme Court of West Virginia in *State v. Frew*, 24 W. Va., at page 477, uses the following language:

"Having thus shown that this court has the power to punish for contempt, it must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never, except when the necessity is plain and unmistakable. It is not given for the private advantage of the judges who sit in the court, but to preserve to them that respect and regard of which courts cannot be deprived and maintain their usefulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges, that the court may command that respect and sanctity so essential to make the law itself respected, and that the streams of justice may be kept pure and uncorrupted. . . .

"The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well-being of organized society, the rights of property, and the life and liberty of the citizen is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired. . . .

"We know full well that respect to courts or judges cannot be compelled. 'Respect is the voluntary tribute of the people to worth, virtue, and intelligence; and, while these are found on the judgment seat, so long, and no longer, will courts retain the public confidence.' But the people have placed the judge in a position in which he unavoidably comes in conflict

with the jealousies and resentments of those upon whose interest he has to act. His character, virtue, and intelligence, however pure and unselfish, are not always a protection against the prejudices and passions of such as conceive themselves injured by his legitimate and proper official acts; and, when assailed by such, if he may not punish them as a court, 'he will be reduced to the alternative of either submitting tamely to contumely and insult, or to resenting it by force, or resorting to the doubtful remedy of an action at law.' "

As was said by Judge Dade in *Dandridge's Case*, 2 Va. Cas. 408: "In such a state of things it would rest in the discretion of every party in court to force the judge either to shrink from his duty, or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To suppose that the personal character of the judge would be a sufficient guaranty against this is to imagine a state of society which would render the office of the judge wholly unnecessary."

The enumeration of subjects punishable as direct contempts in the act under consideration seems to embrace almost every conceivable form of that offense which can occur in the presence of, or in proximity to, the court; that is to say, under circumstances likely to arouse the passion or prejudice of the judge, and disturb the equanimity essential to calm and wise judicial action. The court may punish summarily not only all such offenses, but for disobedience or resistance to any lawful process, judgment, decree, or order; its officers, jurors, and witnesses may also thus be punished; and only the parties to the suit are entitled to a trial by jury. Thus we see that offenses of a nature personal to the court are to be punished by the court, while those which interest suitors are punishable only by a jury. So that suitors, having obtained a judgment or decree, after long and expensive litigation, find the court powerless to secure to them its fruition and enjoyment, and, unless their antagonist chance to be a law-abiding citizen, discover that their success has only begotten another controversy. Ours is a law-abiding community, and good citizens will, without compulsion, respect the lawful orders of their courts; but in every society there are those who obey the laws only because

there is behind them a force they dare not resist. Is it wise or beneficent legislation which accepts the obedience of the good citizen, but is powerless to enforce the law against the recalcitrant? Under this law, the authority of the courts would be reduced to a mere "power of contention."

We are fully aware of the delicate duty involved in holding a statute to be unconstitutional, and we fully recognize that it should never be done, except in the case of a plain deviation from the organic law.

"The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree and dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it. But the courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action, and, in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction." Cooley, *Const. Lim.* (6th ed.), p. 192.

"In exercising this high authority, the judges claim no judicial supremacy. They are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." See *Lindsay v. Commissioners*, 2 Bay, 38, 61; *People v. Rucker*, 5 Colo. 455.

Reading the constitution of the State in the light of the decisions of eminent courts which we have consulted, we feel warranted in the following conclusions:

That in the courts created by the constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated, but cannot be destroyed, or so far

diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in, and to be exercised by, the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; that, while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred.

It was suggested in argument that to maintain the position that to intrust juries with the power to punish for contempts would impair the efficiency and dignity of courts disclosed a want of confidence in that time-honored institution. May it not be said in reply that to take from courts a jurisdiction which they have possessed from their foundation betrays a want of confidence in them wholly unwarranted by experience? The history of this court, and indeed of all the courts of this Commonwealth, shows the jealous care with which they have ever defended and maintained the just authority and respect due to juries as an agency in the administration of justice; but our duty, as we conceive it, requires us not to be less firm in vindicating the rightful authority and power of the courts.

We cannot more properly conclude this opinion than by a quotation from a great English judge: "It is a rule founded on the reason of the common law that all contempts to the process of the court, to its judges, jurors, officers, and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction, or consequentially,—that is to say, whether they be by act or writing,—are punishable by the court itself, and may be abated instantaneis as nuisances to public justice.

"There are those who object to attachments as being contrary, in popular constitutions, to first principles. To this it may briefly be replied that they are the first principles, being founded on that which founds government and constitutes law. They are the principles of self-defense,—the vindication, not only of the authority, but of the very power of acting in courts. It is in vain that the law has the right to act, if there be a power above the law which has a right to resist. The law would

then be but the right of anarchy and the power of contention." Holt, Libel, ch. 9.

Whatever opinion may be entertained of some of his predecessors, Chief Justice Holt was no servile minion of arbitrary power. He was an actor in that great revolution which ended forever in Great Britain the pernicious dogma of the divine right of kings, which first recognized the will of the people as the only rightful source of government, and established the independence of the judiciary as one of the surest bulwarks of free institutions.

The judgment of the circuit court is affirmed.

NOTES (by J. F. G.).—*Procedure as to criminal contempt.*—If the act or acts constituting the contempt are done in the immediate presence of the court, the offense is termed direct contempt, and the court, having personal knowledge of the fact, may on his own motion proceed to administer a punishment; but if the contemptuous conduct is entirely, or partly, out of the presence of the court, it is termed indirect or constructive contempt, and, like all other criminal matters, the court cannot proceed in relation thereto until it is informed of the offense, which must be under oath, usually by affidavit, in which the statement of facts must be explicit and certain. If the statements in the affidavit do not show a *prima facie* case, with the necessary essentials, the proceeding cannot stand. *Batchelder v. Moore*, 42 Cal. 412; *State v. Sweetland*, 3 S. D. 503, 54 N. W. Rep. 415; *McDonald v. State*, 46 Ind. 298; *Cooley v. State*, 46 Neb. 603, 65 N. W. Rep. 799; *State v. Root*, 5 N. D. 487, 67 N. W. Rep. 590; *Young v. Cannon*, 2 Utah, 560; *In re Spencer*, 4 MacArthur, 433. If the affidavit is insufficient, giving ball does not cure the defect (*State v. Gallup*, 1 Kan. App. 618, 42 Pac. Rep. 406), nor does appearance and answer (*Wilson v. Territory*, 1 Wyo. 155). If a sufficient showing is made in the affidavit, the accused is required to show cause why he should not be punished, and, in some instances, may be required to answer interrogatories filed. If he does not answer, the statements of the accusation are taken as true; but if he answers, it must be by affidavit, in which the statements must be made with sufficient certainty that, if falsely made, he is liable to the penalties of perjury. If in his answer he denies all of the charges in detail, or sufficient to controvert the charge of contempt, he is deemed to have purged himself of the contempt, and is entitled to his discharge (*United States v. Dodge*, 2 Gall. 313; *In re Pittman*, 1 Curt. (U. S.) 186; *People v. Few*, 2 Johns. 290; *Jackson v. Smith*, 5 Johns. 115; *In re May*, 1 Fed. Rep. 737; *Burke v. State*, 47 Ind. 528; *State v. Earl*, 41 Ind. 464; *In re Walker*, 82 N. C. 95; *Ex parte Biggs*, 64 N. C. 202; *In re Moore*, 63 N. C. 397; *Converse v. Wood*, 5 Ab. Pr. 84; *Rex v. Sims*, 12 Mod. 511; *Saunders v. Methuish*, 6 Mod. 73; *Thomas' Lessees v. Cummings*, 1 Yates, 40; *Porter v. Low*, 16 How.

Pr. 549; *Matter of Strong*, 5 Rogers City Hall Recorder, 8; *Matter of Spooner*, 5 Rogers City Hall Recorder, 109; *Livingston v. Lucas*, 6 Ala. 147; *Welsh v. People*, 30 Ill. App. 399; 4 Blackstone's Commentaries, 283-287; for there is no jury to determine the issue joined, and hence, the charge being criminal, the defendant's answers must be taken as conclusive in that proceeding.

Procedure as to civil contempt.—Civil contempt consists in acts of commission or omission in disobedience of a writ, order, or decree of the court, detrimental to the interests of a party litigant; the judgment of conviction being entered solely as a legal process to enforce the writ, order, or decree, and in no sense as a punishment for an indignity or insult offered to the court. This is well illustrated by an Illinois case where a circuit judge imposed a fine because of an alleged violation of a decree of that court. The appellate court reversed the conviction upon the ground that the violation of the decree did not appear to be detrimental to the interest of a party litigant. *Diedrich v. People*, 37 Ill. App. 604. An appeal in the name of the People was taken to the Supreme Court, where a motion was made to dismiss the appeal, in that the People had no right to an appeal in a criminal matter; but the Supreme Court overruled the motion and held that, although the action was in the name of the People, it was a remedial action, for the purpose of enforcing a decree of the court; but upon hearing of the case affirmed the judgment of the appellate court upon the ground that the contempt proceeding was not "for the purpose of vindicating the power and dignity of the court," but was a chancery proceeding for the benefit of the complainants in an injunction suit, and that, as no injury had been done to the complainants, no punishment could be imposed upon the respondent. *People v. Diedrich*, 141 Ill. 665, 30 N. E. Rep. 1038.

The Virginia statute in question.—Presumably by the act of 1897-98 it was intended to curb the powers of the court and guard the rights of the accused in contempt proceedings; but like many other ill-advised efforts at reform legislation, even were the act valid as an entirety, it would not accomplish the reform intended. Instead of curbing, it grants new power to the court, by enlarging the definition of direct contempt. It includes in that class acts not done in the presence of the court, but "so near as to obstruct the administration of justice;" also interference with officers, witnesses or jurors on their way to or returning from court, and the resistance of lawful process of the court. These matters, previous to the statute, were constructive contempt, and required a specific charge, of which the accused might purge himself upon his oath; but it is attempted by the act to give the court power to hear "the evidence submitted," and determine the matter without a trial by jury. Thus an effort is made to remove safeguards and transfer the major part of constructive contempt out of its class, and grant to the judge power to hear evidence and determine issues of fact regarding criminal offenses not committed in his presence, thereby infringing the constitutional right of trial by jury, so zealously guarded by the common-law rule applying to constructive

contempt. Of the few remnants left in the wreck, a trial by jury is offered the accused, who before the statute, if innocent, could on his own oath acquit himself.

The few excerpts given in the opinion would indicate that the statute is limited to criminal contempt, and has no application to those cases where the proceeding is remedial in its nature, and, as held in some cases, evidence on both sides is submitted to the judge.

The statute was passed upon at the same term of court as to other provisions contained in it. (See next case in this volume, *Trimble v. Commonwealth.*)

TRIMBLE V. COMMONWEALTH.

96 Va. 818—32 S. E. Rep. 786.

Decided March 23, 1899.

CONTEMPT: *Constitutional law—Disclaimer—Habeas corpus for custody of child.*

1. If the provisions of an act of the legislature are so interwoven, connected and interdependent on each other, that disregarding one would destroy the efficiency of the others, then a provision violative of the constitution will render the entire act void; but if the provisions are separate, distinct and not interdependent, and a part of the act complete and effective after the objectionable part is eliminated, then that part of the act is valid and may stand as the complete act.
2. A mother having presented a petition for a writ of *habeas corpus* for the possession of her child, whom she had voluntarily left in the custody of another woman, and pending the hearing of the writ the child is remanded into the custody of the respondent, "until the further order of the court;" and the respondent having, with the sanction of the judge, taken the child temporarily out of the State, in which other State a guardianship for the child was declared; and on the return of the respondent she makes answer that, believing it was the wish of the court that the child should be placed with a private family or at a school, in order to effect this object, and acting under advice, and not intending to evade the process of the court, she permitted the guardianship proceedings to be had, *held*, no contempt.

Error to the Corporation Court of the City of Lynchburg.

A judgment holding the plaintiff in error in contempt was entered May 4, 1898. Reversed.

H. M. Ford and *R. D. Yancey*, for the plaintiff in error.

A. J. Montague, Atty. Gen., for the Commonwealth.

KEITH, P. One Susie Fox filed her petition in the corporation court for the city of Lynchburg, alleging that she is the mother of a female child five years of age, named Lillian May Fox; that she had theretofore placed this child with a certain Ella Trimble to keep and care for during the petitioner's expected absence from the city of Lynchburg, with the understanding that the child would be delivered to her on her return. Ella Trimble refused, upon the mother's demand, to restore the child to her custody, and thereupon this petition was filed, praying for a writ of *habeas corpus*. A rule to show cause against the writ was issued, and, upon the answer made by Ella Trimble, the court entered the following order:

"Upon consideration of the within petition and answer and the evidence, the court doth remand the child Lillian May Fox to the custody of Ella Trimble until the further order of the court. May 10, 1897."

On the 22d of March, 1898, the following order was entered in this proceeding:

"It is ordered that the defendant, Ella Trimble, do produce the body of Lillian May Fox in court on the first day of the next term of the said corporation court for the city of Lynchburg, and show cause, if any she can, why the said order heretofore made on the said 10th day of May, 1897, should not be revoked."

In compliance with this order, Ella Trimble filed her answer, in which she states the proceedings up to that time, and then goes on to say that when the case was before the court in May, 1897, and the child was remanded to her custody, she understood it to be the wish of the court that she should either place the child in some private family, or at a school, where it would be properly cared for; that, in order to effect this object, she went with the child to Wake county, N. C., where, at the suggestion of her sister, Mollie Trimble, and acting under the advice of counsel, a guardian, upon motion of her sister, was appointed by the superior court of that county; that the child had since been placed with one W. E. Bonner, who the evidence shows to be a kind-hearted, honest, and industrious citizen. Respondent further states that, "when she took this child, it was in a sick and starving condition, when neither the law,

nor any person on its behalf, gave it any attention; that she has spent more than a year of sleepless and anxious nights in watching and coaxing the little spark of vitality into life;" and that the child has gradually improved under her care. The answer further avers that she is unable to comply with the mandate of the court to produce the body of the child before it; that she no longer has the care and control of it; that she has no desire to evade the process of the court; and, in an amended answer filed at a subsequent day, she specifically disclaims any contempt of court.

The court certifies in the record that it did not consider either the relator or respondent a suitable person to have the child; that in the summer of 1897 respondent asked if it would be wrong for her to take the child on a short visit to her sister in Raleigh, N. C., and was informed by the judge of the court that it would not be if she would not keep it away; that, while on this visit, her sister, who is not a proper person to have the child, qualified in a North Carolina court as its guardian, and the child has never returned.

Upon the consideration of the rule, answer, and exhibits filed with it, and the facts thus stated by the court, it was of opinion that the answer of Ella Trimble was insufficient, and entered an order that "she be attached until she produces the body of the said child, in the proceedings mentioned, before this court, or until the further order of the court." To this judgment, a writ of error was awarded.

With respect to some of the questions presented. After, without further comment, to the opinion of the court in the case of *Carter's Case*, decided at the present term, which is, so far as applicable to the case, made a part of this opinion.

We are of opinion, however, that the act of the legislature of 1897-98, which was in that case adjudged to be unconstitutional in some of its aspects, is a valid statute in so far as it gives this court jurisdiction upon writ of error to review this judgment.

That a statute may be constitutional in part and unconstitutional as to some of its provisions is well settled. See *Home-stead Cases*, 22 Gratt. 266; *Wise v. Rogers*, 24 Gratt. 169, and *Black v. Trower*, 79 Va., at page 127, where it is said:

"It is true that a statute in some of its provisions may be unconstitutional and void, and in others valid and enforceable. But when the valid part is so connected with, and dependent on, that which is void as that the parts are not distinctly separable, so that each can stand as the will of the legislature, the whole must fall."

But the converse is equally true; and, where the parts may be so separated as that each can stand as the will of the legislature, the good does not perish with the bad.

We are of opinion that the case is properly before us by virtue of the act of 1897-98, p. 548.

We gather from the record that plaintiff in error took this child, which had been restored to her custody by the order of May 10, 1897, to North Carolina, with the assent of the corporation court of Lynchburg, and with the intention of carrying out a commendable purpose, sanctioned by the court, with respect to this little waif. When in North Carolina, at the suggestion of her sister and upon her motion, and acting under the advice of counsel, a court of competent jurisdiction in that State was requested to appoint, and did appoint, a guardian for this little child. That guardian seems to have made an arrangement with respect to the child's nurture of a beneficial character, and there is no evidence that in thus acting the respondent did so with the object of defeating the jurisdiction and authority of the corporation court of Lynchburg. She disclaims any such purpose, and beyond the facts stated, which do not necessarily, or, it may be said, even naturally, bear such an interpretation, we are of opinion that the offense wherewith she was charged has not been established, and that the corporation court of Lynchburg erred in the judgment rendered, which is reversed.

Reversed.

STATE V. KLECTZEN.

8 N. Dak. 286—78 N. W. Rep. 984.

Decided April 26, 1899.

CONSTITUTIONAL LAW: *License act—Hawkers and peddlers.*

1. An act of the Sixth Legislative Assembly entitled "An act taxing the occupation of hawking and peddling, and regulating the licensing of persons engaged in such occupation," construed, and *held* to be a measure intended to produce revenue by taxing the occupation of peddling; and *held*, further, that the same was also intended as a police measure to regulate such occupation.
2. Said statute nowhere states or indicates the objects or purposes of the tax, nor does it declare how the revenue to be derived thereunder is to be applied. Accordingly, *held*, that the act is repugnant to the provisions of section 175 of the State constitution, and therefore void.
3. *Held*, further, that it cannot be sustained as a measure of police regulation after the revenue features of the act are eliminated as unconstitutional.
(Syllabus by the Court.)

Appeal from District Court of Grand Forks County; Fisk, Judge.

Simon Klectzen was accused of peddling without a license. A demurrer to the information being sustained, the State appeals. Affirmed.

Ledru Gothrie, for the State.

Bosard & Bosard and *Templeton & Rex*, for the respondent.

WALLIN, J. Upon the record in this case, the sole question which is presented for the decision of this court is whether a certain statute is a constitutional and valid enactment. The statute in question was enacted at the late session of the legislative assembly of this State, and is entitled as follows: "An act taxing the occupation of hawking and peddling, and regulating the licensing of persons engaged in such occupation." The statute contains seven sections, the several provisions of which may be summarized as follows: Section 1 forbids peddling in any county in this State without first obtaining a license so to do from the county auditor. Section 2 requires per-

sons desiring a license to peddle in any county to make a written application to the auditor of such county for a license, and to state "in what manner the applicant desires to travel as a peddler, whether on foot, or with one or more horses or other beasts of burden." Section 3 is as follows: "Each applicant, before he shall be entitled to such license, shall pay into the county treasury of the county where such application is made, the following sums respectively as and for the taxes due from him on account of the pursuit of the occupation of peddling, to wit: If for a license to travel on foot the sum of \$25; if for a license to travel and carry his goods with a single horse, or other beast carrying or drawing a burden, the sum of \$100; if for a license to travel with a vehicle or carriage drawn by two or more horses, or other animals, the sum of \$150. Said license shall authorize the holder thereof to pursue within said county the business of hawking and peddling in the manner set forth in said license for the period of one year from the date of its issue, and no longer." Section 4 requires the auditor, upon filing a written application for such license, together with the treasurer's receipt for the proper fee, to grant a license to peddle in such county for the period of one year, and for no other or shorter period. Section 5 requires the auditor to make a certain record of the transaction. Section 6 imposes criminal penalties for peddling in any county without such license, and the same penalties are prescribed for the offense of refusing, upon request, to produce such license for examination. Section 7 declares that "nothing contained in this article shall be so construed as to impair, interfere with or take away any existing rights or authority of incorporated cities, towns and villages to license and regulate peddlers within their incorporated limits."

Counsel contend that this statute is unconstitutional as a taxing measure, in this: that it violates section 176 of the State constitution, which provides that "laws shall be passed taxing by uniform rule all property according to its true value in money;" and in support of this point counsel cite the case of *Willis v. Oil Co.* (Minn.), 52 N. W. Rep. 652; also, from the same State, the case of *Minces v. Shoenig*, 75 N. W. Rep. 711. In both of these cases the court was considering a provision of

the constitution of the State of Minnesota which is practically the same as section 176 of the constitution of North Dakota.

- The first case cited arose under a statute which authorized an inspection of illuminating oils, and required that certain inspection fees should be paid by the owner for inspecting the oil. The court upheld this statute as a police regulation, and stated that the law could not be sustained as a taxing measure, because it would run counter to the provision of the constitution of that State, "requiring taxes to be as nearly equal as may be and to be levied on a cash valuation." Const., art. 9, § 1. The fees for inspecting the oil, if regarded as a tax upon the oil, would be a tax which would not be uniform, and one also not based upon the value of the property. In the other Minnesota case (a city ordinance requiring auctioneers to pay a license fee for the privilege of selling certain classes of goods, and in addition to pay a per cent. upon the gross sales of such goods) the court said, in effect, that the requirement to pay a per cent. on the sales was a tax upon the property sold, and was void as a tax, because it was not uniform, and was not based upon any cash valuation; but the other feature of the ordinance was sustained. We regard neither of these cases as being in point, because the statute under consideration nowhere attempts to lay a tax upon property, and from this it follows that constitutional restrictions upon legislation imposing taxes upon property are inapplicable to the statute in question. In our judgment, the act under consideration, in so far as it may be called a tax law, is an occupation tax law, framed to derive revenue from the occupation of peddling, and hence the same is not restricted by the constitutional requirement of valuation and of uniformity. Cooley, Taxation, 570; 25 Am. & Eng. Enc. Law, p. 480, and notes 2, 3. It is our opinion that this law was enacted to effect a twofold purpose: It seems to be designed both as a revenue measure, and as a means of regulating the occupation of peddling; and in this double aspect the statute is referable both to the police power inherent in the State, and the authority to impose taxes. It is true that many cases can be found holding that subordinate political bodies, which have no original and inherent power of taxation, are without authority to tax an occupation under a charter delegating the right to regulate only;

but with the sovereign State, which possesses plenary power, unless expressly restricted by organic law, both to tax and to regulate, there is no such limitation of authority. Hence it is that laws are sometimes passed to accomplish the double purpose of regulation and revenue. See *Kitson v. Mayor, etc.*, 26 Mich. 325; Cooley, Taxation (2d ed.), pp. 570, 597. A license measure may include a taxing measure, or it may not. If its chief purpose is clearly to regulate, and nothing else, it then falls within the police power. In such cases the exaction must not be any greater than is necessary to effect the primary object in view, viz., regulation. *Mays v. City of Cincinnati*, 1 Ohio St. 268. This rule is well established; but the matter of regulation may embrace more than a mere license fee, and include expenses which are incidental and indirect as well as those clearly growing out of the business license. See the Minnesota cases above cited. And in the case of *Minces v. Shoenig, supra*, the court uses the following significant language: "The very fact that a license is required tends to exclude dishonest or otherwise unfit persons from conducting such sales." This is equivalent to holding that the exaction of a license fee is in itself a police regulation, and we think that such fee might be very efficient as a police regulation, under this statute, as tending to diminish the number of persons who would engage in the business of peddling and hawking within the State. It is manifest that one of the purposes of the statute is to regulate the business of peddling. The act grants the privilege to exercise the calling of a peddler, upon certain conditions, and withholds the privilege from all who fail to comply with such conditions. In this aspect, it is a measure of regulation. See 25 Am. & Eng. Enc. Law, p. 15, and note 1; Cooley, Taxation, p. 573. Moreover, as has been seen, there are certain clearly regulative features embraced in the act. The exaction of a license is, in our judgment, designed as a regulation, and the requirement that the peddler shall, on demand, produce his license, is also a regulative feature; and, as has been seen, the payment of a fee, especially as in this case, where the same is considerable in amount, would certainly tend to diminish the number of those engaging in the business, and consequently tend, in a degree, to restrict and regulate the business.

Whether the statute is also designed in part as a revenue-producing measure is perhaps a question of greater difficulty, but we are inclined to hold that it was so designed. In the first place, it may be said, as a matter of common knowledge, that the occupation of peddling in this State is carried on by a class of transients and strangers, who usually stay in one community but a few days, and rarely, if ever, remain in any county for the period of one full year. In view of this well-known custom, it would seem that a license for a much shorter period than a year—say for a week or a month—would be sufficiently long to accomplish all purposes of mere police regulation. This law, however, will permit no license to be issued for a shorter period than twelve months, and from this we think it fair to infer that the matter of revenue was a prominent consideration in passing the law. But the terms of the act lead to the same conclusion. Section 3, above set out, requires that the applicant "shall pay into the county treasury of the county where such application is made the following sums respectively, as and for the taxes due from him on account of the pursuit of the occupation of peddling." This explicit declaration hardly leaves room for doubt that the idea of revenue by taxation was prominently before the lawmaker in enacting this statute. But, if any doubt could arise on the point, a reference to the title of the act will tend to dispel such doubt. The title unmistakably shows the intention to tax as well as to regulate. We do not feel at liberty to override the express language of the law, as it would be necessary to do if we construed the same as a mere police regulation, to the exclusion of any idea of revenue.

This brings us to the decisive question in the case. Counsel for the defendant contends that this statute is enacted in violation of the provisions of section 175 of the State constitution, which reads as follows: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." As we have said, the act under consideration is designed in part as a tax law; and as such, therefore, it must be construed, in so far as it is a revenue-producing measure. An examination of the law reveals the fact that it nowhere states the object of the tax which the law exacts from the peddler. From the terms of the act, it cannot be ascertained how the funds to be derived

from it are to be applied, or to what objects or purposes the same are to be devoted. In this we think the law wholly fails to conform to the requirements of the constitution. For this reason we shall hold that it is void, and never took effect as a law. It is obvious that it cannot stand as a mere measure of police regulation, if the various sums named in it cannot be exacted of the applicant for a license. By the terms of the act, the license cannot issue until the tax is paid. It is true that section 3 of the statute requires the license tax to be paid into the county treasury. But this, in our opinion, falls short of indicating the object of the tax. All taxes, whether State, county, city, or school, are paid into the county treasury, because, under the law, the treasurer of the county is the tax collector of all classes of taxes; but the disposition to be made of the proceeds of taxes when collected depends wholly upon the terms of the law under which each is levied and collected. In this respect the statute in question is wholly silent. The provisions of section 175 of the State constitution are clear and unambiguous, and the same are mandatory upon the legislature, and hence we are compelled to hold that the statute is repugnant to the constitution. The same conclusion has been reached by other courts under similar constitutional provisions. Section 175 is a literal reproduction of section 5 of article 12 of the constitution of the State of Ohio. See *Pittsburg, C. & St. L. Ry. Co. v. State*, 49 Ohio St. 189 (opinion, 198), 30 N. E. Rep. 436. In the case cited the court held that a certain statute, which, as appeared, was enacted as a revenue measure by the legislature of Ohio, and which required that the revenue derived under it should be paid into the State treasury, was unconstitutional because it omitted to declare the object or purpose of the tax. This case is exactly in point here. See, also, to the same effect, *Westinghausen v. People*, 44 Mich. 265, 6 N. W. Rep. 641. In the case last cited the court sustained a law which declared that a tax should be placed in the contingent fund, as being a sufficient compliance with the constitution of Michigan, but the statute we are construing contains no similar provision as to the disposition of the funds to be derived under it. This statute, as has been seen, refers to no fund. The judgment of the district court will be affirmed. All the judges concurring.

KIRBY v. UNITED STATES.

174 U. S. 47—19 Sup. Ct. Rep. 574, 43 L. Ed. 890.

Decided April 11, 1899.

CONSTITUTIONAL LAW: *Statutes in derogation thereof—Rights of accused to be confronted with witnesses—Receiving stolen property.*

1. A statute providing that a judgment of conviction against any person or persons for embezzling, stealing or purloining any money or other property of the United States shall, on the trial of one accused of receiving such property, be conclusive evidence that the same has been embezzled, stolen or purloined, is violative of the clause of the constitution of the United States which declares that in all criminal prosecutions the accused shall be confronted with the witnesses against him.
2. The case against the receiver of stolen property is separate and distinct from that of the principals already tried, and it is essential that the fact that the property was stolen should be proved in each case, and the alleged receiver has the right to examine the witnesses establishing such fact.
3. It is not necessary that the indictment should allege the ownership of the property stolen to have been in the United States at the time of the felonious receiving thereof, nor to allege the name of the person or persons from whom the defendant received the same.

Mr. Assistant Attorney-General Boyd, for the United States.

A. G. Safford, for the plaintiff in error; *C. O. Bailey* and *Joseph Kirby*, on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error Kirby was indicted in the district court of the United States for the southern division of the district of South Dakota under the act of Congress of March 3, 1875, ch. 144, entitled "An act to punish certain larcenies, and the receivers of stolen goods." 18 Stat. 479.

The first section provides that "any person who shall embezzle, steal or purloin any money, property, record, voucher or valuable thing whatever of the moneys, goods, chattels, records or property of the United States shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have

in possession said property so embezzled, stolen or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

By the second section it is provided that "if any person shall receive, conceal or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher or valuable thing whatever, of the moneys, goods, chattels, records or property of the United States which has theretofore been embezzled, stolen or purloined, such person shall, on conviction before the circuit or district court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted; and such receiver may be tried either before or after the conviction of the principal felon; but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen or purloined." 18 Stat. 479.

The indictment contained three counts, but the defendant was tried only on the first. In that count it was stated that Thomas J. Wallace, Ed. Baxter and Frank King, on the 7th day of June, 1896, at Highmore, within the jurisdiction of the court, feloniously and forcibly broke into a postoffice of the United States, and feloniously stole, took and carried away therefrom certain moneys and property of the United States, to wit: 3,750 postage stamps of the denomination of two cents and of the value of two cents each, 1,266 postage stamps of the denomination of one cent and of the value of one cent each, 140 postage stamps of the denomination of four cents and of the value of four cents each, 250 postage stamps of the denomination of five cents and of the value of five cents each, 80 postage stamps of the denomination of eight cents and of the value of eight cents each, and also United States Treasury notes, national bank notes, silver certificates, gold certificates, silver,

nickel and copper coins of the United States as well as current money of the United States, a more particular description of which the grand jury were unable to ascertain, of the value of \$58.19; and that the persons above named were severally indicted and convicted of that offense, and had been duly sentenced upon such conviction.

It was then alleged that the defendant, on the 9th day of June, 1896, at the city of Sioux Falls, the postage stamps "so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken and carried away, contrary to the form, force and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States."

At the trial of Kirby the government offered in evidence a part of the record of the trial of Wallace, Baxter and King, from which it appeared that Wallace and Baxter, after severally pleading not guilty, withdrew their respective pleas and each pleaded guilty and was sentenced to confinement in the penitentiary at hard labor for the term of four years. It appeared from the same record that King, having pleaded not guilty, was found guilty and sentenced to the penitentiary at hard labor for the term of five years.

The admission in evidence of the record of the conviction of Wallace, Baxter and King was objected to upon the ground that the above act of March 3, 1875, was unconstitutional so far as it made that conviction conclusive evidence in the prosecution of the receiver that the property of the United States described in the indictment against him had been embezzled, stolen or purloined. The objection was overruled, and the record offered was admitted in evidence with exceptions to the accused.

After referring to the provisions of the act of March 3, 1875, and to the indictment against Kirby, the court, among other things, said, in its charge to the jury: "In order to make out the case of the prosecution and in order that you should be authorized to return a verdict of guilty in this case, you must find

beyond a reasonable doubt from the evidence in the case certain propositions to be true. In the first place it must be found by you beyond a reasonable doubt that the property described in the indictment, and which is also described in the indictment against these three men (Wallace, Baxter, and King), who it is alleged have been convicted, was actually stolen from the postoffice at Highmore, was the property of the United States and of a certain value. Second. You must find beyond a reasonable doubt that the defendant Joseph Kirby received or had in his possession a portion of that property which had been stolen from the postoffice at Highmore. Third. That he received or had it in his possession with intent to convert it to his own use and gain. Now, upon the first proposition—as to whether the property described in the indictment was stolen as alleged in the indictment,—the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons—that is, the parties who it is alleged committed the larceny. Now, in the absence of any evidence to the contrary, the record is sufficient proof in this case upon which you would be authorized to find that the property alleged in the indictment was stolen as alleged; in other words, it makes a *prima facie* case on the part of the government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and, there being no such evidence in this case, you will, no doubt, have no trouble in coming to a conclusion that the property described in the indictment was actually stolen, as alleged, from the postoffice at Highmore. But I don't want you to understand me to say that that record proves that the stamps that were found in Kirby's possession were stolen property, or that they were the stamps taken from the Highmore postoffice. Upon the further proposition that the court has suggested, after you have found, by a careful consideration of all the evidence, beyond a reasonable doubt, that the property alleged in the indictment was stolen, then you will proceed to consider whether or not the defendant ever at any time, either on the date alleged in the indictment or any other date within three years previous to the finding of the indictment, had in his possession or received any of this property which was stolen from the postoffice of Highmore. Now, in

order to find the defendant guilty of the offense charged in the indictment, you would have to find beyond a reasonable doubt from all the evidence that he either actually received a portion or all of the property which was stolen from the postoffice at Highmore, and that he received that property from the thief or thieves who committed the theft at the Highmore postoffice or some agent of these thieves. The statute punishes, you will observe, both the receipt of the stolen property, knowing it to have been stolen, with the intent described in the statute, and also the having in the possession such property, knowing it to have been stolen, with the intent to convert it to the person's own use or gain. If you find beyond a reasonable doubt that any of the property which was stolen at the postoffice at Highmore was actually received or had in the possession of the defendant, then you cannot convict unless you further find that the defendant had the property in his possession or received it from the thief or his agent, knowing at the time that it was stolen property. Now, upon the question of whether the defendant knew that it was stolen property, you will, of course, consider all the evidence in the case. You have the right to find that the person or the defendant knew that it was stolen property from the admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have the right to infer that he did know. Now, if a person received property under such circumstances that would satisfy a man of ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen. Now, the next point in the case is in regard to the intent the defendant had in regard to the use or disposal of the property. The statute requires that this receipt of stolen property, knowing it to have been stolen, must also be with the intent to convert it to the use of the party in whose possession it is found. There are statutes which simply punish the knowingly receiving stolen property. That was the common law. But this statute has added this further ingredient, that it must be done with the intent to convert it to the party's own use and gain. It was probably put

in for the reason that the statute goes further than the common law, making it punishable to conceal or aid in concealing with intent to convert it to his own use and gain. Now, all these propositions that I have charged must be made out by the prosecution, of course, beyond a reasonable doubt, and in case you have a reasonable doubt of any of these ingredients, it will be your duty to acquit the defendant."

In response to a request from the jury to be further instructed, the court, after referring to the indictment and to the second section of the act of 1875, said: "This indictment does not contain all the words of the statute. This indictment charges the defendant with having, on the 9th day of June, 1896, received and had in his possession these postage stamps that were stolen from the United States at Highmore. Now, if you should find beyond a reasonable doubt from all the testimony in the case, in the first place, that the postage stamps mentioned in the indictment, or any of them, were stolen from the postoffice at Highmore by these parties who it is alleged did steal them, and you further find beyond a reasonable doubt that these postage stamps, or any portion of them, were on the 9th day of June, 1896, received by the defendant from the thieves or their agent, knowing the same to have been so stolen from the United States by these parties, with the intent to convert the same to his use and gain, or if you find beyond a reasonable doubt that they were so stolen at the Highmore postoffice, as I have stated, and that the defendant, on or about the 9th day of June, had them in his possession, or any portion of them, knowing the same to have been so stolen, with the intent to convert the same to his own use and gain, and you will find all these facts beyond a reasonable doubt, you would be authorized to return a verdict of guilty as charged."

The jury returned a verdict of guilty against Kirby. The exceptions taken by him at the trial were sufficient to raise the questions that will presently be considered.

As shown by the above statement, the charge against Kirby was that on a named day he feloniously received and had in his possession with intent to convert to his own use and gain certain personal property of the United States, theretofore feloniously stolen, taken and carried away by Wallace, Baxter and King,

who had been indicted and convicted of the offense alleged to have been committed by them.

Notwithstanding the conviction of Wallace, Baxter and King, it was incumbent upon the government, in order to sustain its charge against Kirby, to establish beyond reasonable doubt (1) that the property described in the indictment was in fact stolen from the United States; (2) that the defendant received or retained it in his possession, with intent to convert it to his own use or gain; and (3) that he received or retained it with knowledge that it had been stolen from the United States.

How did the government attempt to prove the essential fact that the property was stolen from the United States. In no other way than by the production of a record showing the conviction under a separate indictment of Wallace and Baxter, resting wholly upon their respective pleas of guilty, while the judgment against King rested upon a trial and verdict of guilty. With the record of those convictions out of the present case, there was no evidence whatever to show that the property alleged to have been received by Kirby was stolen from the United States.

We are of the opinion that the trial court erred in admitting in evidence the record of the convictions of Wallace, Baxter and King, and then in its charge saying that, in the absence of proof to the contrary, the fact that the property was stolen from the United States was sufficiently established against Kirby by the mere production of the record showing the conviction of the principal felons. Where the statute makes the conviction of the principal thief a condition precedent to the trial and punishment of a receiver of the stolen property, the record of the trial of the former would be evidence in the prosecution against the receiver to show that the principal felon had been convicted; for a fact of that nature could only be established by a record. The record of the conviction of the principals could not, however, be used to establish, against the alleged receiver, charged with the commission of another and substantive crime, the essential fact that the property alleged to have been feloniously received by him was actually stolen from the United States. Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proven to be guilty

by witnesses who personally testified before the jury. Nor was Kirby entitled of right to participate in the trial of the principal felons. If present at that trial he would not have been permitted to examine Wallace and Baxter upon their pleas of guilty, nor cross-examine the witnesses introduced against King, nor introduce witnesses to prove that they were not in fact guilty of the offense charged against them. If he had sought to do either of those things—even upon the ground that the conviction of the principal felons might be taken as establishing *prima facie* a vital fact in the separate prosecution against himself as the receiver of the property,—the court would have informed him that he was not being tried and could not be permitted in anywise to interfere with the trial of the principal felons. And yet the court below instructed the jury that the conviction of the principal felons upon an indictment against them alone was sufficient *prima facie* to show, as against Kirby, indicted for another offense, the existence of the fact that the property was stolen—a fact which, it is conceded, the United States was bound to establish beyond a reasonable doubt in order to obtain a verdict of guilty against him.

One of the fundamental guarantees of life and liberty is found in the sixth amendment of the constitution of the United States, which provides that “in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him.” Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offense for which he may be convicted without reference to the principal offender,—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules

governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. "This presumption," this court has said, "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin v. United States*, 156 U. S. 432, 459. But that presumption in Kirby's case was in effect held in the court below to be of no consequence; for, as to a vital fact which the government was bound to establish affirmatively, he was put upon the defensive almost from the outset of the trial by reason alone of what appears to have been said in another criminal prosecution with which he was not connected and at which he was not entitled to be represented. In other words, the United States having secured the conviction of Wallace, Baxter and King as principal felons, the defendant charged by a separate indictment with a different crime—that of receiving the property in question with knowledge that it was so stolen and with intent to convert it to his own use or gain—was held to be presumptively or *prima facie* guilty so far as the vital fact of the property having been stolen was concerned, as soon as the government produced the record of such conviction and without its making any proof whatever by witnesses confronting the accused of the existence of such vital fact. We cannot assent to this view. We could not do so without conceding the power of the legislature, when prescribing the effect as evidence of the records and proceedings of courts, to impair the very substance of a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most if not of all the States composing the Union.

This precise question has never been before this court, and we are not aware of any adjudged case which is in all respects like the present one. But there are adjudications which proceed upon grounds that point to the conclusion reached by us.

A leading case is *Rex v. Turner*, 1 Moody's Crown Cases, 347. In that case the prisoner was indicted for feloniously re-

ceiving from one Sarah Rich certain goods and chattels theretofore feloniously stolen by her from one Martha Clarke. At the trial before Mr. Justice Patteson it was proposed to prove a confession of Sarah Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner and others as well as herself. The evidence was not admitted, but the court admitted other evidence of what Sarah Rich said respecting herself only. The prisoner was convicted and sentenced. The report of the case proceeds: "Having since learned that a case occurred before Mr. Baron Wood at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver, the learned judge thought it right to submit to the learned judges the question, whether he was right in admitting the confession of Sarah Rich in the present case. The learned judge thought it right to add that the prisoner, one Taylor, and Sarah Rich had immediately before been tried upon an indictment for burglary, and stealing other property in the house of Mrs. Clarke on the night of the 22d of August; and that Taylor and Rich had been found guilty, but the prisoner had been acquitted, there being no proof of his presence. The learned judge did not pass sentence upon Sarah Rich immediately; but a new jury was called, and the prisoner was tried as a receiver, so that either party might have called her as a witness. In Easter term, 1832, all the judges (except Lord Lyndhurst, C. B., and Taunton, J.) met, and having considered this case, were unanimously of opinion that Sarah Rich's confession was no evidence against the prisoner; and many of them appeared to think that had Sarah Rich been convicted, and the indictment against the prisoner stated, not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means; and the conviction was held wrong." In a later case, *Keable v. Payne*, 8 Ad. & Ell. 555, 560, which was an action involving a question as to the admission of certain evidence, and was heard in the Queen's Bench before Lord Denman, Chief Justice, and Littledale, Patteson

and Williams, Justices, Mr. Justice Patteson, referring to *Rex v. Turner*, above cited, said: "On an indictment for receiving goods feloniously taken, the felony must be proved; and neither a judgment against a felon, nor his admission, would be evidence against the receiver. In such a case I once admitted evidence of a plea of guilty by the taker; and it was held that I did wrong." A note in Starkie on Evidence, p. 367, is to this effect: "In *R. v. Turner*, 1 Moo. C. C. 347; *R. v. Ratcliffe*, 1 Lew. C. C. 112; *Keable v. Payne*, 8 Ad. & E. 560 (35 E. C. L. R. 454), it is stated that many of the judges (all the judges except two being assembled) were of opinion that the record of the conviction of the principal would not be evidence of the fact, where the indictment against the accessory alleged not the conviction but the guilt of the principal. And on principle it would seem to be evidence only when the indictment alleges the conviction of the principal, and *simply to support that allegation.*"

The leading American case on the question is *Commonwealth v. Elisha*, 3 Gray, 460. The indictment was for receiving stolen goods knowing them to have been stolen. The court, speaking by Metcalf, J., said: "This indictment is against the defendant alone, and charges him with having received property stolen by Joseph Elisha and William Gigger, knowing it to have been stolen. It is not averred, nor was it necessary to aver or prove (Rev. St., ch. 126, par. 24), that they had been convicted of the theft. But it was necessary to prove their guilt, in order to convict the defendant. Was the record of their conviction on another indictment against them only, upon their several pleas of guilty to a charge of stealing the property, legal evidence, against the defendant, that they did steal it? We think not, either on principle or authority. That conviction was *res inter alios*. The defendant was not a party to the proceedings, and had no opportunity nor right to be heard on the trial. And it is an elementary principle of justice, that one man shall not be affected by another's act or admission, to which he is a stranger. That conviction being also on the confession of the parties, the adjudged cases show that it is not evidence against the defendant. *Rex v. Turner*, 1 Moo. C. C. 347, and 1 Lewin's C. C. 119; 1 Greenl. Ev., par. 233; Rose. Crim. Ev. (2d ed.) 50;

The State v. Newport, 4 Harr. (Del.) 567. We express no opinion concerning a case differing in any particular from this, but confine ourselves to the exact question presented by these exceptions. Our decision is this, and no more: The record of the conviction of a thief, on his plea of guilty to an indictment against him alone for stealing certain property, is not admissible in evidence to prove the theft on the trial of the receiver of that property, upon an indictment against him alone, which does not aver that the thief has been convicted."

To the same general effect are some of the text-writers. Phillips, in his Treatise on the Law of Evidence, referring to the rule as to the admissibility and effect of verdicts or judgments in prosecutions, says: "A record of conviction of a principal in felony has been admitted in some cases, not of modern date, as evidence against the accessory. *R. v. Smith*, Leach Cr. C. 288; *R. v. Baldwin*, 3 Camp. 265. This has been supported on the ground of convenience, because the witnesses against the principal might be dead or not to be found, and on the presumption that the proceedings must be taken to be regular, and the guilt of the convicted party to be established. *Fost. Disc.*, iii, ch. 2, s. 2, p. 364. But this is not strictly in accordance with the principle respecting the admissibility of verdicts as evidence against third persons. From the report of the recent case of *Rex. v. Turner*, it seems that a record of conviction of a principal in the crime of stealing, who pleads guilty, would not now be received as evidence of the guilt of the principal against the receivers of the stolen property, or the accessory after the fact; and it is said to be doubtful whether a record of the conviction of the principal on his plea of not guilty would be admissible against the accessory. As proof of the fact of conviction, the record would be admissible and conclusive, but it seems not to be admissible evidence of the guilt of the convict, as against another person charged with being connected with him in crime, the record being in this respect *res inter alios acta*. It is evidence that a certain person, named in the record, was convicted by the jury, but not evidence as against a third person, supposed to have been engaged with him in a particular transaction, as to the ground on which the conviction proceeded, namely, that the convict committed the criminal act described in the

record." 2 Phillips' Ev. (3d ed.), pp. 22, 23. Taylor, in his Treatise on Evidence, after stating that a prisoner is not liable to be affected by the confessions of his accomplices, says: "So strictly has this rule been enforced, that, where a person was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft was held by all the judges to be no evidence of that fact as against the receiver (*R. v. Turner*); and the decision, it seems, would be the same, if both parties were indicted together, and the principal were to plead guilty. (Id.)" 1 Taylor's Ev., par. 826 (6th ed.).

The principle to be deduced from these authorities is in harmony with the view that one accused of having received stolen goods with intent to convert them to his own use, knowing at the time that they were stolen, is not, within the meaning of the constitution, confronted with the witnesses against him, when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel. As heretofore stated, the crime charged against Wallace, Baxter and King and the crime charged against Kirby were wholly distinct—none the less so because in each case it was essential that the government should prove that the property described was actually stolen. The record of the proof of a vital fact in one prosecution could not be taken as proof in the other of the existence of the same fact. The difficulty was not met when the trial court failed, as required by the act of 1875, to instruct the jury that the record of the conviction of the principal felons was conclusive evidence of the fact that the property had been actually stolen, but merely said that such record made a *prima facie* case as to such fact. The fundamental error in the trial below was to admit in evidence the record of the conviction of the principal felons as competent proof for any purpose. That those persons had been convicted was a fact not necessary to be established in the case against the alleged receiver; for, under the statute, he could be prosecuted even if the principal felons had not been tried or indicted. As already stated, the effect of the charge was to enable the government to put the accused, although shielded by the presumption of innocence, upon the defensive as to a vital fact involved in the charge

against him by simply producing the record of the conviction of other parties of a wholly different offense with which the accused had no connection.

It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the constitution, and was not intended to be abrogated. The ground upon which such exception rests is that, from the circumstances under which dying declarations are made, they are equivalent to the evidence of a living witness upon oath—"the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth." *Clyde Mattox v. United States*, 146 U. S. 140, 151; *Cooley's Const. Lim.* 318; 1 *Phillips on Ev.*, ch. 7, par. 6.

For the reasons stated, it must be held that so much of the above act of March 3, 1875, as declares that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver that the property of the United States alleged to have been embezzled, stolen or purloined, is in violation of the clause of the constitution of the United States declaring that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Upon this ground the judgment must be reversed and a new trial had in accordance with law. But as the case must go back to the circuit court for another trial, it is proper to notice other questions presented by the assignments of error.

The accused contends that the indictment is defective in that it does not allege ownership by the United States of the stolen property at the time they were alleged to have been feloniously received by him. This contention is without merit. The indictment alleges that the articles described were the property of the United States when they were feloniously stolen on the 7th day of June, 1896, and that the defendant, only two days thereafter, on the 9th day of June, 1896, "the postage stamps aforesaid so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have in his possession, with

intent then and there to convert the same to his own use or gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken and carried away." The stamps alleged to have been feloniously received by the accused on the 9th day of June are thus alleged to have been the same that were stolen from the United States two days previously. The larceny did not change the ownership, and it must be taken that the United States had not regained possession of the stamps before they were received by Kirby and that the indictment charges that they were out of the possession of the United States and stolen property when they came to the hands of the accused.

Another contention by the accused is that the indictment was fatally defective in not stating from whom the defendant received the stamps. This contention is apparently supported by some adjudications, as in *State v. Ives*, 13 Ired. 338. But upon a careful reading of the opinion in that case it will be found that the judgment rests upon the ground that the statute of North Carolina, taken from an old English statute, made the receiver of stolen goods strictly an accessory and contemplated the case of the goods being received from the person who stole them. As already stated, the act of Congress upon which the present indictment rests makes the receiving of stolen property of the United States with the intent by the receiver to convert it to his own use or gain, he knowing it to have been stolen, a distinct, substantive felony, for which he can be tried either before or after the conviction of the principal felon, or whether the latter is tried or not. Under such a statute the person who stole the property might be pardoned, and yet the receiver could be indicted and convicted of the crime committed by him. Bishop, in his *New Criminal Procedure*, says that while some American cases have held it to be necessary in an indictment against the receiver of stolen goods to state from whom he received the goods, "commonly, in England and in numbers of our States, the indictment does not aver from whom the stolen goods were received." Vol. 2, par. 983. By an English statute, 7 & 8 Geo. IV., June 21, 1827, ch. 29, par. 54, it was enacted that "if any person shall receive any chattel, money, valuable security or other property whatsoever the stealing or

taking whereof shall amount to a felony either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice," etc. Under that statute a receiver of stolen goods was indicted. It was objected that one of the counts did not state the name of the principal, or that he was unknown. Tindall, C. J., said: "It will do. The offense created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore, will be, whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. Your objection is founded on the too particular form of the indictment. The statute makes the receiving of goods, knowing them to have been stolen, the offense." *Rex v. Jervis*, 6 C. & P. 156; 2 Russell on Crimes (6th ed.), 436. In *State v. Hazard*, 2 R. I. 474, an indictment charging the accused with fraudulently receiving stolen goods, knowing them to have been stolen, was held to be good, although it did not set forth the name of any person from whom the goods were received, nor that they were received from some person or persons unknown to the grand jurors. We therefore think that the objection that the indictment does not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, is not well taken. If the stamps were in fact stolen from the United States, and if they were received by the accused, no matter from whom, with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged even if it were not shown by the evidence from whom he received the stamps. This rule cannot work injustice nor deprive the accused of any substantial right. If it appears at the trial to be essential, in the preparation of his defense, that he should know the name of the person from whom the government expected to prove that he received the stolen property, it would be in the power of the court to require

the prosecution to give a bill of particulars. *Coffin v. United States*, 156 U. S. 432, 452; *Rosen v. United States*, 161 U. S. 29, 25; *Commonwealth v. Giles*, 1 Gray, 466; *Rosc. Crim. Ev.* (6th ed.) 178, 179, 420.

The judgment is reversed, and the case is remanded with directions for a new trial and for further proceedings consistent with law.

MR. JUSTICE BROWN and MR. JUSTICE MCKENNA dissented.

MR. JUSTICE BREWER did not participate in the decision of this case.

STATE V. COUCH.

54 S. C. 286—32 S. E. Rep. 408.

Decided February 28, 1899.

CONSTITUTIONAL LAW: *Statute providing for vague indictments.*

A statute declaring that an indictment may use the words "divers other persons" is in contravention of the constitution, which required that the accused be fully informed of the nature and cause of the accusation.

Conviction in Pickens Circuit Court for selling liquor. Defendant appeals.

Mr. J. P. Carey, for appellant.

Solicitor Ansel, for the State.

POPE, J. The appellant was convicted of selling a quart of liquor to Newton Oates, under an indictment charging him with the sale of spirituous liquors to "one W. S. Newell, R. L. Bryant, Robert Holden, G. W. Russell, and to divers other persons to the jurors aforesaid unknown." He appeals from the sentence under said conviction upon several grounds. This court does not deem it necessary to pursue the questions presented by the appellant except one of them, for it is important that this single question should be met. We hold that the conviction of the appellant, under this indictment, was illegal, because opposed to the constitution of the State. In article I, sec-

tion 18, it is provided: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, *and to be fully informed* of the nature and cause of the accusation." It is the office of an indictment to fully disclose to the accused the nature and cause of the accusation. Any indictment which fails to fully disclose the offense to the accused is defective. In the indictment under review, in the present case, it will be observed that the name of Newton Oates does not appear as one of the persons to whom the defendant, appellant, is charged as having sold intoxicating liquors. However, it is sought to justify the absence of Oates' name from the indictment by proof that the defendant, appellant, sold him liquor, which sale, under and by virtue of the forty-third section of the dispensary act, approved in 1896 (22 Stat. 148), allowing an indictment to contain the words "to divers other persons to the jurors aforesaid unknown," was punishable just as if the name of Newton Oates had been actually set forth in the indictment. In the recent case of *The State v. Jeffcoat*, ante, p. 196, this court held that in an indictment where these words, "to divers other persons to the jurors aforesaid unknown," occur, such words might be treated as surplusage if one or more persons were called by name, and the persons so named in the indictment were on trial. This last-named case is practically decisive of the question raised here. The forty-third section of the dispensary act of 1896, authorizing the use of the words "divers other persons," etc., cannot be made to override the constitutional requirement that every accused must have his offense fully set forth in the indictment or presentment of the grand jury.

It is the judgment of this court that the judgment of the circuit court be reversed.

NOTES (by J. F. G.).—A conspiracy statute in Indiana contained the following proviso: "Provided, that, in any indictment under this section, it shall not be necessary to charge the particular felony which it was the purpose of such person or persons, or the object of each (such) person or persons, or body, association or combination of persons to commit." In passing upon this statute the Supreme Court of that State, *Landringham v. The State*, 49 Ind. 186, said: "We are very clearly of the opinion that the proviso is in conflict with the constitution, and against natural right, and hence is absolutely void. If the

Indictment need not charge the particular felony intended to be committed, the accused would have no means of knowing, before the trial commenced, what offense he was charged with, and consequently would have no opportunity of preparing for his defense. The question was so fully considered by this court in the case of *McLaughlin v. The State*, 45 Ind. 338, that we do not deem it necessary to re-argue or restate it."

In the *McLaughlin Case*, just cited, a judgment was reversed with instructions to sustain the motion to quash the indictment. The indictment, like that in the South Carolina case, was based upon an act regarding the sale of intoxicating liquors. In reversing the conviction the court said:

"Any person who is the keeper of any room, tavern, eating-house, bazaar, restaurant, drug store, grocery, coffee-house, cellar or other place of public resort, is liable to be prosecuted under this section, and if the form used in this case is sufficient, it need only be alleged that liquors were sold by him to divers persons. How is he to prepare for his defense against such a charge? Or, if he shall be indicted a second time, how can it be made to appear that he has already been arraigned upon the same charge? There is no country, we presume, where the principles of the common law prevail, and the liberty of the citizen is respected, where the State is not required, in bringing an alleged criminal into court to answer a crime, to prefer against him, in the form of an affidavit, information, or indictment, a specific accusation of the crime charged. It is accordingly provided in the constitution of the State, section 13, article 1: 'In all criminal prosecutions the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.' The accused has a right to demand the nature and cause of the accusation against him, and to have a copy thereof. The accusation must be in writing. This is necessarily implied from the fact that the accused has a right to have a copy thereof. 'The nature and cause of the accusation' must be stated. The constitutional guaranties, which we have just quoted, are of the utmost importance to a person accused of crime, and a disregard of them, or any of them, even in a prosecution designed to suppress a traffic so full of evil as that of retailing intoxicating liquors, cannot be tolerated with any regard to the proper and safe administration of the criminal laws."

The provision of a statute in Illinois reads as follows: "Every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years. In every indictment under the preceding section, it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., un-

lawfully and feloniously obtain, or attempt to obtain (as the case may be), from A. B. (here insert the name of the person defrauded or attempted to be defrauded), his money (or property, in case it be not money), by means and by use of the confidence game." In *Morton v. People*, 47 Ill. 468, the above provision as to the form of an indictment was held not to be in conflict with the constitution.

JOHNSTON v. UNITED STATES.

30 C. C. A. 612—87 Fed. Rep. 187.

Circuit Court of Appeals, Fifth Circuit.

Decided April 26, 1898.

CONSTITUTIONAL LAW: *Inferential pleadings—Variance—Verification of an information.*

1. To comply with the fundamental law of the United States, it is necessary that the verification to an information filed by a district attorney should show facts within the knowledge of the affiant. A statement that "there is probable cause to believe" is not sufficient. Perjury could not be based upon such verification, if false.
2. An information should state facts positively, and not by inference.
3. Variance between allegations and proof.

Error to District Court of the United States, Middle District of Alabama.

S. L. Fuller, for the plaintiff in error.

W. S. Reese, for the United States.

Present: Pardee and McCormick, Circuit Judges, and Wayne, District Judge.

PARDEE, J. Preston T. Johnston, who prosecutes this writ of error, was tried, convicted, and sentenced for the violation of sec. 5399, Rev. St. U. S., on an information as follows:

"The United States versus P. T. Johnston.

"No. 2,953. Information. District of the United States for the Middle District of Alabama. For the November Term, A. D. 1896.

"Before the Hon. John Bruce, District Judge."

"Be it remembered that George F. Moore, as district attorney of the United States for the Middle District of Alabama, who

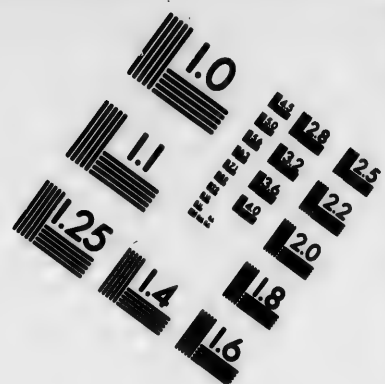
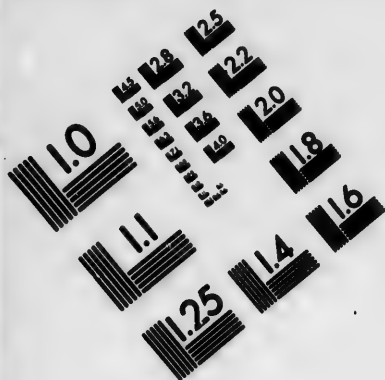
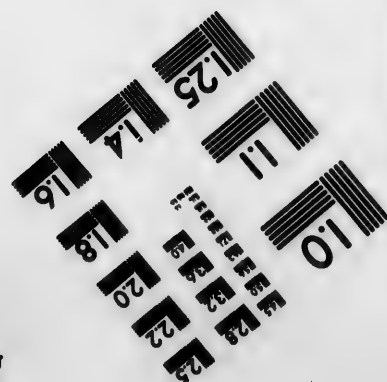
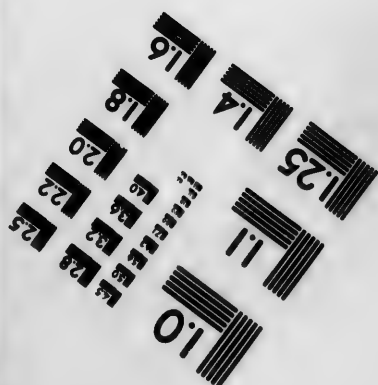
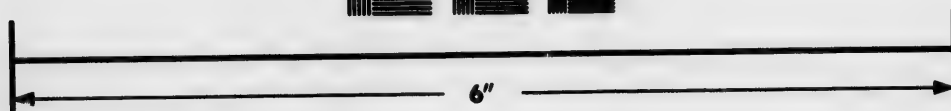
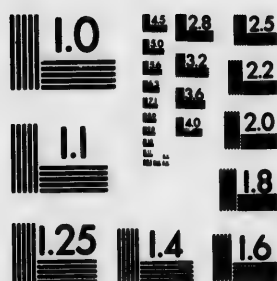


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for the said United States, in this behalf, prosecutes in his proper person, comes here unto the district court of the United States for the said Middle District of Alabama, on the tenth day of December, A. D. 1896, in this same term, and gives the court here to understand and be informed that heretofore, on the fourth day of December, A. D. 1896, before the filing of this information, in the county of Montgomery, within said Middle District of Alabama, and within the jurisdiction of said court, P. T. Johnston, whose name to the district attorney is otherwise unknown, did unlawfully and corruptly endeavor to obstruct the due administration of justice in the district court of the United States for the Middle District of Alabama, in this: That during the present term of said district court there was and still is pending on the docket of said court an indictment charging one J. E. Bailey, *alias* Ed. Bailey, with a violation of the internal revenue laws of the United States for unlawfully knowingly removing, to wit, five hundred gallons of distilled spirits, on which the tax due the United States had not been paid, from a warehouse for distilled spirits authorized by law, without first paying the tax thereon, and with removing said spirits in a manner otherwise than provided by law, to wit, by stealth and without proper notice being given to the officers of the United States; and the said Bailey was then and there under bond to appear for trial on the fourth day of December, 1896, under the indictment charging him with said offense; and, the said case having been duly called for trial in said court, the said Bailey, through his counsel, sought to have the said criminal case against him continued until the next term of the said district court, and, in support of his said application, filed the following certificate, to wit:

“STATE OF ALABAMA, Franklin County. I hereby certify that Mr. J. E. Bailey, who is now suffering with a simple fracture of the tibia, will be for some time unable to travel, or to perform any kind of physical labor where it would be necessary to be upon his feet.

“In witness whereof, I hereunto set my hand and seal, this November 29th, 1896. P. T. JOHNSTON, M. D.

“Personally appearing, Dr. P. T. Johnston made oath that

the foregoing statement by him subscribed is in all respects correct and true.

“JAS. S. McCLUSKEY, [Seal.] Notary Public.

“Filed Dec. 4, 1896. J. W. DIMMICK, CLERK.”

“And, the said district attorney gives the court to understand and be informed that the said Johnston knew, when he made the said certificate, and furnished the same to the said Bailey, that the said certificate was false, and he, the said Johnston, furnished the said certificate to the said Bailey for the purpose of obstructing the due administration of justice in said district court of the United States for the Middle District of Alabama, by and in causing the said case against the said Bailey to be continued for the term of said court without any legal or just cause therefor, and then and there and thereby obstructing the due administration of justice in the said court of the United States. Whereupon the said district attorney of the United States for the said United States prays the consideration of the court in the premises, and that due process of law may be moved against the said P. T. Johnston in this behalf to make him answer the United States concerning the premises aforesaid.

“GEO. T. MOORE, United States Attorney.”

Accompanying this information, and as the basis thereof, appears the following affidavit:

“United States of America, Middle District of Alabama—ss.: Before me, John Bruce, judge of the district court of the United States for the Middle District of Alabama, personally appeared J. A. Dudley, who, being by me first duly sworn, deposes and says that the offense of obstructing the due administration of justice in the district court of the United States, for the Middle District of Alabama, has been committed, and that there is probable cause to believe that the said offense has been committed by P. T. Johnston. J. A. DUDLEY.

“Sworn to and subscribed before me this, the tenth day of —, A. D. 1896.

“JOHN BRUCE, Judge.”

The record shows that the plaintiff in error first demurred to the indictment, on the ground that the information was not based upon an affidavit showing facts within the personal knowl-

edge of the affiant. This demurrer being overruled, Johnston filed a plea in abatement, the grounds of which do not appear in the record. Following the plea in abatement, Johnston appears to have demurred generally to the information. The bill of exceptions found in the record purports to give all the testimony adduced on the trial of the case. The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that "there is probable cause to believe that the said offense has been committed by P. T. Johnston." However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it.

In *United States v. Tureaud*, 20 Fed. Rep. 621, the law with regard to the sufficiency of an affidavit upon which an information can be lawfully based is fully considered and discussed on principle and authority, and therein it is held that "the probable cause supported by oath or the affirmation prescribed by the fundamental law of the United States, sufficient to base an information upon, is the oath or the affidavits of those persons who of their own knowledge depose to the facts which constitute the offense." In *United States v. Polite*, 35 Fed. Rep. 59, it is held that "informations must be based on affidavits which show probable cause arising from the facts within the knowledge of the parties making them, and that mere belief is not sufficient." Tested by these authorities, the affidavit in the present case was fatally defective.

The demurrer to the information should have been sustained. The information first charges that Johnston "did unlawfully and corruptly endeavor to obstruct the due administration of justice in the district court of the United States for the Middle District of Alabama in this: [Then reciting matters and things done by one J. E. Bailey, but nothing whatever that was done or charged to have been done by Johnston.]" Following this, and apparently as a second count in the information, Johnston is charged with furnishing a certain certificate to the said Bailey

for the purpose of obstructing the due administration of justice in said district court of the United States for the Middle District of Alabama, which he knew when he made and furnished the same was false. Only incidentally or inferentially is it charged that Johnston made the said certificate, and nowhere is it specifically charged that he made it and furnished it with any corrupt intent. There was no evidence in the case to show that Johnston made or furnished the specific certificate set forth in the information. It is true, there was evidence tending to show that he made and furnished to the said Bailey a certificate similar to a part of the certificate set forth in the information; but there is a fatal variance between the certificate proved to have been made and furnished by Johnston and the one charged in the information to have been furnished by him. For these reasons, the judgment of the district court is reversed, and the case is remanded, with instructions to set aside the verdict and sentence and quash the information.

NOTES (by J. F. G.).—Practically the same subject came up before the Supreme Court of Kansas in *State v. Gleason*, 32 Kan. 345, 5 Am. Crim. Rep. 172, where the subject of consideration was an information filed and verified by the county attorney upon information and belief. The Kansas statutes provided: "When the information in any case is verified by the county attorney, it shall be sufficient if the verification be upon information and belief," and the court said: "If the statutes were controlling, and there was no limitation or qualification thereof, and no constitutional inhibition, it is manifest that a verification upon hearsay or belief would be sufficient;" but the court cites the constitutional provision that "no warrant shall issue but on proper cause supported by oath or affirmation;" and after a careful review of the authorities held that the verification was insufficient and reversed the judgment of the court below.

In *Myers v. People*, 67 Ill. 503, the question came before the court as to whether a certain complaint, under oath, was a sufficient basis for the filing of an information in the county court charging the defendant with selling liquor without license. Judge McAllister in a careful review of the matter held that the complaint in that case was sufficient, in that it stated sufficient facts, on which perjury could be assigned if the statements were false; but he concludes the opinion as follows:

"We are of opinion that the fifth section of the county court act should be construed with reference to the sixth section of the 'Bill of Rights,' which declares that 'no warrant shall issue without probable cause supported by affidavit,' etc.

"If informations could be filed, upon which a warrant for arrest may

issue without affidavit, the door would be opened to intolerable abuses; every man's liberty would be at the mercy of the caprice or malice of the State or county attorney."

Judge McAllister again announced this doctrine in *People ex rel. Smith v. Brown*, 6 Chi. Legal News, 392, heard in August, 1874, by him in chambers, as judge of the Supreme Court, upon a writ of *habeas corpus*. The prisoner was arrested upon a warrant issued from the county court of Lake county, based upon an information made by the State's Attorney, but not supported by affidavit. It was contended by the State's Attorney that the warrant was issued in accordance with sections 117 and 118 of the act of March 25, 1874, in relation to the jurisdiction and procedure of the county court; while the prisoner's counsel cited as authority, *Myers v. People*, *supra*. The judge incorporated in his opinion the above paragraphs from *Myers v. People*, and then said: "This expression was not necessary to the decision of any point in the case further than this: There were affidavits, but it was claimed they did not show probable cause. If none at all were necessary, that would be an answer to that objection. However, if the remarks could be regarded as *obiter dicta*, they were not the *dicta* merely of the judge who delivered the opinion. He was directed to make them by a majority of the court. That section of the county court act did not expressly or impliedly authorize the State's Attorney to file information *ex officio* without proof. But by the 117th section of the present act he is so authorized. The question is one of so much, of so vital, importance to the civil liberties of the citizen, that I have felt it my duty to look further into the question and see if the court took an erroneous view of it in what was said in *Myers v. The People*."

After reviewing the act then in question, the court remarked that the practice was not novel, and said: "It is borrowed and substantially copied from an odious feature of the English law engrafted upon those laws and tolerated through favor to the prerogatives of the Crown, and against the better feelings of England's old-time lawyers and judges of broad and humane views. Sir Matthew Hale was no friend of this mode of prosecution."

Then, after reciting authorities, the judge continues: "It will be seen by consulting that and other authors, the English law, unaffected by the vicious principles introduced by the Tudors, sanctioned a prosecution by information, filed *ex officio* by the Attorney-General, only in great emergency, and then always in that high and respectable jurisdiction, the King's Bench. The reason by which this procedure was supported does not, and cannot, apply in this country."

The judge then again reviews English authorities and English history and concludes that that portion of the act in question which attempts to authorize arrests to be made upon informations not supported by affidavit is unconstitutional and void. The prisoner was discharged.

As this case was heard in chambers, the opinion has not found its way to the official reports, but is none the less an authority, coming as it does from one of the ablest judges of his time.

VANDEVER v. STATE.

1 Marvel (Del.), 209—40 Atl. Rep. 1105.

Superior Court of Delaware, Newcastle County, February Term, 1894.

CONSTITUTIONAL LAW: *Insufficiency of a criminal complaint.*

As the constitution requires that the defendant shall be fully informed of the offense, a criminal complaint based upon a statute which declares it a nuisance to "wilfully enter into, upon, or trespass on the ways, lands or premises of another," which omits the word "wilful," is insufficient in a matter of substance.

Harry Vandever, being convicted of committing a nuisance, brings error. Reversed.

The complaint upon which the warrant was issued was as follows:

"On this 12th day of June, A. D. 1893, personally appeared Charles E. Barrett, of Newcastle hundred, in the county of Newcastle and State of Delaware, who, being by me duly sworn according to law, deposes and says that a certain Harry W. Vandever, of Wilmington hundred, in said county, did at Newcastle hundred, aforesaid, on the 9th day of June, A. D. 1893, commit a trespass upon the ways, lands, and premises of the said Charles E. Barrett, after being forewarned, by entering thereon and assuming forcible possession thereof, and against the law, peace, and dignity of the said State."

The defendant below was convicted of committing a nuisance, in violation of ch. 190, vol. 19 of Delaware laws. The exception on which the case turned was that the record did not show that he was charged with having "wilfully" committed the trespass.

Ward, for defendant below.

Rodney, for plaintiff below.

LORE, C. J. The constitution requires that the defendant shall be fully informed of the offense against him; and this statute under which he is convicted says:

"That if any person shall wilfully enter into, upon, or trespass upon the ways, lands, or premises of another in this State, he shall be guilty of a nuisance."

It seems to us that the word "wilful" is a substantial element of the crime, and necessary to be set forth in terms.

The only doubt which was suggested during the argument was occasioned by the terms of section 2, of chapter 97, Revised Code, which provides that:

"Justices of the peace may issue all writs, warrants and processes proper to carry into effect the powers granted to them; and when no form is prescribed by statute, they shall frame one in conformity with the law, in substance; and, when substantially right, such process shall not be invalid for any defects in form."

We think that the word "wilful" is not a matter of form. It is a matter of substance, of the essence of the crime charged, and ought to be set forth in the complaint and shown in the transcript and in the proceedings. While this is not an indictment, and the statute would cure all mere matters of form, yet there must be alleged, in substance, sufficient to meet the statutory provision, and it is necessary to set forth in these proceedings every substantial matter with the same certainty which would be required in an indictment. There would be no other safe rule.

We think, therefore, that this judgment ought to be reversed.

NOTE (by J. F. G.).—Although decided in 1894, the case was not reported until 1898. The superior court seems to be a court of last resort in Delaware, and accordingly the opinion regarded as an authority. Two points in the opinion are worthy of especial notice: First. It is the defendant's right under the *constitution* to be fully informed as to the accusation; second, a complaint should be as specific as an indictment.

LIPPMAN V. PEOPLE.

175 Ill. 101—51 N. E. Rep. 872.

Opinion filed October 24, 1898.

CONSTITUTIONAL LAW: *Special legislation—Criminal complaints—Search-warrants.*

1. A law may be general though it applies only to a particular class of persons, but it is essential that the classification be made so general as to bring within its limits all persons who are substantially in the same situation.

2. The words "other beverages," used in the Trade-mark Act of 1873 (Rev. Stats. 1874, p. 1084), following the words "ale, porter, lager beer, soda," and "mineral water," include only beverages of the same kind or class described by those particular antecedent terms.
3. The Trade-mark Act of 1873, for the protection of "manufacturers, bottlers and dealers in ale, porter, lager beer, soda, mineral water and other beverages, from the loss of their casks, barrels, kegs, bottles and boxes," is a special law, granting exclusive privileges in violation of the last two clauses of section 22 of article 4 of the constitution.
4. Section 6 of article 4 of the constitution, providing that no search-warrant shall issue without probable cause, supported by affidavit, requires the affiant to state facts sufficient to satisfy the magistrate that probable cause exists for issuing the warrant.
5. An act which attempts to substitute the mere belief of the owner of property or of his agent that probable cause exists for issuing a search-warrant, for the judicial discretion of the magistrate, and which authorizes a warrant to issue without a showing of facts, but upon mere belief or suspicion of the affiant, is unconstitutional.
6. A search is unreasonable, within the meaning of the constitution, the object of which is to enable an individual, who has scattered his property abroad, to search the premises of parties suspected of using such property without written consent, in order to regain the same, and thus collect evidence leading to prosecutions.
7. The Trade-mark Act of 1873 (Rev. Stats. 1874, p. 1084) is violative of section 22 of article 4 of the constitution, concerning special legislation, and of section 6 of article 2 of the constitution, concerning unreasonable searches and seizures.

Writ of error to the Criminal Court of Cook County; the Hon. Theodore Brentano, Judge, presiding.

Zolotkoff & Zoline (John F. Geeting, of counsel), for plaintiff in error:

If two statutes are clearly repugnant to one another, the one last enacted operates as a repeal of the former. *Trustees v. Chicago*, 14 Ill. 334; *Andrews v. People*, 75 id. 605.

Section 22 of article 4 of the constitution prohibits the passage by the General Assembly of local special laws by which any corporation, association or individual might be granted any special or exclusive privilege, immunity or franchise whatever. Special legislation is prohibited in all cases where the general law can be made applicable. The act of 1873, to protect manufacturers of ale, etc., upon which this prosecution is based, was passed in violation of the said constitutional provision. A

search-warrant is not allowed to issue for the purpose of collecting evidence of an intended crime, but only after evidence of an offense committed. *Cooley's Const. Lim.* 299.

Unreasonable searches and seizures, and laws and ordinances to that effect, are condemned in *Sullivan v. Oneida*, 61 Ill. 242.

An arbitrary act of the legislature taking the property of one and giving it to another is not "due process of law." "Due process of law" means the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. *Board of Education v. Bakewell*, 122 Ill. 399.

Class legislation cannot be successfully defended on the theory of police power of the State, because the legislature, in the exercise of the police power, cannot prescribe that which is not necessary to the health, safety or welfare of the public and is oppressive to the private citizen. *Railway Co. v. Jacksonville*, 67 Ill. 37.

An affidavit is a statement of facts reduced to writing with that degree of clearness and positiveness that if falsely made the affiant may be held guilty of perjury. *Myers v. People*, 67 Ill. 503; *Ex parte Dimmig*, 74 Cal. 164; *People v. Heffron*, 53 Mich. 527; *Ex parte Lane*, 6 Fed. Rep. 34; *Miller v. Munson*, 34 Wis. 579; *Peers v. Carter*, 4 Litt. 269; *People v. Becker*, 20 N. Y. 354; *Neal v. Gordon*, 60 Ga. 112.

The statute now under consideration simply requires the complainant to make the general statement "that he has reason to believe, and does believe, that any manufacturer . . . is using, in any manner," etc. (sec. 4 of act), and in that regard not only falls short of, but is in violation of, the constitutional requirement. The statute attempts to transfer the judicial discretion from the judicial officer to the complainant, and permits the complainant to pass upon the question of probable cause. This class of supposed affidavits is universally condemned, both in civil and criminal practice, when used to disturb a citizen in his constitutional security. *People v. Heffron*, 53 Mich. 527; *Ex parte Dimmig*, 74 Cal. 164; *Hart v. Grant*, 66 N. W. Rep. 322; *Ex parte Lane*, 6 Fed. Rep. 34; *United States v. Collins*, 79 id. 65; *Shaw v. Ashford*, 68 N. W. Rep. 281; *Thomson v. Higginbotham*, 18 Kan. 42; *Atchison v. Bartholow*, id. 104;

Clafin v. Bears, 57 How. Pr. 78; *Bank v. Loachemis*, 8 N. Y. Supp. 520; *Thompson v. Best*, 4 id. 229.

E. C. Akin, Attorney-General (*D. C. Hagle*, *C. A. Hill*, and *E. S. Cummings*, of counsel), for the People:

The repeal of an act by implication is never permitted if it can be avoided upon any reasonable hypothesis. *Butz v. Kerr*, 123 Ill. 659; *County of Cook v. Gilbert*, 146 id. 268; *Trausch v. County of Cook*, 147 id. 534.

A subsequent general law will not, by implication, operate as a repeal of a special law on the same subject, though inconsistent with it. *County of Cook v. Gilbert*, 146 Ill. 268; *Butz v. Kerr*, 123 id. 659; *Trausch v. County of Cook*, 147 id. 534.

A law is general if it applies to all persons in the State similarly engaged. *Hawthorn v. People*, 109 Ill. 302; *People v. Hazelwood*, 116 id. 319; *Vogel v. Pekoc*, 157 id. 539; *People v. Cohn*, 149 id. 486; *People v. Cannon*, 139 N. Y. 32.

Section 6 of article 2 of the constitution does not prohibit all searches and seizures, but only such as are unreasonable; and the plain application therefrom is, that a search-warrant may issue if it is for a reasonable search and seizure, and is based upon probable cause, supported by an affidavit particularly describing the place to be searched and the person or things to be seized. *Gindrat v. People*, 138 Ill. 103; *Glennon v. Britton*, 155 id. 232; *Langdon v. People*, 133 id. 382.

Laws with reference to search-warrants, which provide for search for stolen property or other articles illegally kept, requiring that such property and the person in whose possession it is found shall be brought before the justice, are not unconstitutional, as working deprivation of property without due process of law. *Glennon v. Britton*, 155 Ill. 232.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court.

On the affidavit of John A. Carey, agent of the Gottfried Brewing Company, a warrant was issued by a justice of the peace of Cook county, directed to all sheriffs, coroners and constables of this State, commanding them to search the premises of the plaintiff in error for four hundred beer bottles, and forty casks, barrels, kegs and boxes, having the marks of said com-

pany on them, and if the same or any part thereof should be found upon such search, to bring the same before the justice, and arrest the plaintiff in error and bring him also before the said justice, to be disposed of according to law. Return was made on the warrant by the constable who executed it, that he found twenty-seven bottles marked "Gottfried Brewing Co.," and he brought the same before the court, and arrested plaintiff in error and brought him also. The prosecution was instituted under an act entitled "An act to protect manufacturers, bottlers and dealers in ale, porter, lager beer, soda, mineral water and other beverages, from the loss of their casks, barrels, kegs, bottles and boxes." (Rev. St., ch. 140, entitled "Trade-marks.") Plaintiff in error was found guilty and fined. He appealed to the criminal court of Cook county, and at the trial there, the following facts were agreed upon: The Gottfried Brewing Company is a corporation, organized for the purpose of brewing beer. It complied with the provisions of said act by filing in the office of the Secretary of State and in the office of the county clerk of Cook county a description of the names and marks on its bottles and boxes, and by publishing the same. On the bottles are the words "Gottfried Brewing Co., Chicago, Ill.," and "This bottle is never sold," or "Golden Drop" and "Gottfried Brewing Co., Chicago," cast or blown in the glass. The words "Gottfried Brewing Co.'s Golden Drop Beer, Chicago, Tel. South 429," are stamped or marked on the boxes. The defendant is a bottler of lager beer in Chicago, and on July 2, 1894, filled with lager beer twenty-seven bottles so marked. It was proved that he did not have the written consent of the brewing company to make such use of the bottles. He was again convicted and fined \$13.50 and costs, and sued out the writ of error in this case to review the proceedings.

It is conceded that defendant violated the provisions of the act under which he was prosecuted, but it is claimed that the act is unconstitutional, and the case is brought here direct from the trial court on that ground. The provisions of the constitution which it is claimed are violated by the enactment are section 22 of article 4, which prohibits the general assembly from passing a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or fran-

chise whatever, or in any other case where a general law can be made applicable, and section 6 of article 2, which protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

The act in question applies only to manufacturers, bottlers and dealers in ale, porter, lager beer, soda, mineral water and other beverages. The term "other beverages," under the settled rule of construction, includes only beverages of the same kind or class as the particular antecedent terms of description employed in the act. The object of the act, as gathered from its provisions, is to protect and benefit that class of persons. It gives to them the exclusive right to register the names and marks of ownership, stamped or marked on their casks, barrels, kegs, bottles or boxes, and gives to them the exclusive privileges and protection arising therefrom. It confers upon them the power to call upon the State and its officers and judiciary to act as collectors of their bottles, kegs and boxes which they have voluntarily scattered over the State among their customers. It attempts to place at their disposal the extraordinary right of the search-warrant, by which they may arm a constable or other officer with process to intrude upon the premises or the home of any citizen to recover their bottles, kegs and the like. The object of the act is not only evident from its provisions, but also from its title, where the legislature is required to express its general purpose, and which they have expressed as follows: "An act to protect manufacturers, bottlers and dealers in ale, porter, lager beer, soda, mineral water and other beverages, from the loss of their casks, barrels, kegs, bottles and boxes."

While, perhaps, no precise and comprehensive definition of the word "privilege," as used in constitutions, has been attempted, the right to employ remedies for the collection of debts, the recovery of property and the enforcement of rights has always been included in the term as used in the Federal constitution. It seems that the peculiar benefits, advantages and rights conferred by this act upon the persons named in it, and the right to employ an unusual remedy for the recovery of their property, must be classed as privileges,—and this does not seem to be denied in the argument. It is argued, however, that the law conferring these privileges is not a special but a

general one, because it applies to all persons similarly situated. General laws have been defined to be those which relate to or bind all within the jurisdiction of the law-making power, while a special law is limited in the object to which it applies. It is often the case, however, that the rights and protection given by a law cannot be enjoyed by every citizen by reason of the subject to which the law relates. If the law is general, and uniform in its operation upon all persons in like circumstances, it is general in a constitutional sense, but it must operate equally and uniformly upon all brought within the relation and circumstances for which it provides. On the other hand, if it is limited to a particular branch or designated portion of such persons, it is special. *People v. Wright*, 70 Ill. 388; *People v. Cooper*, 83 id. 585; *Hawthorn v. People*, id. 302. Although general in its character, a law may, from the nature of the case, extend only to particular classes, such as minors, married women, laborers, bankers or common carriers. Such a law is not obnoxious to the provisions of the constitution if all persons of the class are treated alike under similar circumstances and conditions, but it is not a proper application of the definition to say that a law is general because it applies uniformly to all persons in the conditions and circumstances for which it provides, although only a particular branch of a class or some particular description of persons. If an act should attempt to confer privileges only on persons of a certain stature it could be said to apply uniformly to all people answering such description, and yet it would be absurd to say that such a law would be a general one. The classification must be so general as to bring within its limits all those who are in substantially the same situation or circumstances.

This act singles out one branch of a class of manufacturers and dealers who may have occasion to use, or who do use in their business, bottles, barrels, kegs or other packages for their goods. It selects those whose particular manufacture or stock consists of certain varieties of drink. No other person who manufactures any product or sells it in casks, barrels, kegs, bottles or boxes can avail himself of the privilege of registering his trade-marks or of the consequent protection, but the act denies to him the privileges afforded to those named in the act. The

grocer, farmer, fruit dealer, merchant, druggist or other dealer or manufacturer cannot avail himself of the privileges or remedy afforded by this act to protect himself against the loss of his property under the same circumstances. The purpose of this act, passed in behalf of the persons named in it, is not to recover bottles stolen, embezzled or fraudulently obtained by false tokens or pretenses, but to make the proceedings under it, as to such persons, a substitute for the action of replevin. The general search-warrant law of the State covers all the cases just mentioned, and was on our statute book when this act was passed. There are, and were, general laws in force, applicable uniformly to all persons in the State, for the recovery of personal property wrongfully obtained by another. This law was needless for that purpose, and it could only have been passed to give to the particular persons named in it additional privileges by making the criminal law supersede the writ of replevin. The plain purpose of the act is to make the officers of the State detectives, searchers for and collectors of beer bottles, beer kegs and the like. It is for a mere private benefit, having no relation to the police power or the protection of the public against frauds or injurious preparations, since, if the brewer or dealer consents, the bottles or kegs may be refilled with any sort of drink different from the marks and it will be no offense under the act, however injurious to the public. The citizen or the health officer can neither institute a prosecution nor cause search to be made, but in either instance it must be by the owner or agent. The public has no rights under it, and neither the title nor any provision indicates any public purpose.

In the case of *Eden v. People*, 161 Ill. 296, the decision turned upon the provision of the Bill of Rights that no person shall be deprived of property without due process of law, but the question whether the act which was being considered violated that provision involved the question whether the act was a general, public law. It was conceded that the act prohibiting keeping open a barber shop on Sunday would be valid if of general and uniform application to all laborers, and the constitutionality of such a law is thoroughly established. The distinction was there pointed out that where legislation concerns laborers and there is no reasonable ground of distinction or division

into classes, the general class includes all laborers, and barbers being only a branch of that class, the law is not general. There is no difference in the application of the principle in the different cases, and the decisions cited in support of the claim that a law is general although applying only to a subdivision of a class, do not support the claim. In *Hawthorn v. People*, *supra*, the act embraced all persons in the State brought within the relation defined by it, and it did not appear that there were any with similar rights or relations excluded from it. In *Cohn v. People*, 149 Ill. 486, the trade-mark law of 1891 was held to be general, on the ground that it extended to every association, person and corporation within the State desiring to avail itself of its privileges. In *Vogel v. Pekoc*, 157 Ill. 339, the statute, which was held to be a general law, applied to all wage earners in the State, and did not attempt to select from that class any particular branch of such laborers. The law exempting the wages of a defendant who is the head of a family, to a certain amount, from garnishment, embraces all heads of families in the State. There is an exception to the exemption law where the claim is for the wages of a laborer or servant, but it includes every laborer and servant. There are laws giving to certain classes a special lien, but they are based on what has been deemed a reasonable ground of distinction,—that the material, services or keeping enhance the value of the property or are necessary to existence. A mechanic's lien law has never distinguished between those who erect buildings of different kinds or different material, and, although uniform in application, such laws have always been regarded so far obnoxious, as conferring special privileges, that they are subject to strict construction. If this act is valid it would be equally so if its benefits were confined to brewers alone, or to the manufacturers of soda or the dealers in mineral waters. It would then, as it does now, embrace only a part of the manufacturers or of dealers in products which require the use of barrels, boxes or bottles. In conferring upon the persons named in the act the exclusive privileges given thereby, of which other citizens are deprived, the constitutional provision is violated.

Section 6 of article 2 of the constitution is as follows: "The right of the people to be secure in their persons, houses, papers

and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched and the persons or things to be seized." Section 4 of the act in question provides as follows: "In case the owner or owners of any cask, barrel, keg, bottle or box so marked, stamped and registered as aforesaid, shall, in person or by agent, make oath in writing, before any justice of the peace or police magistrate, that he has reason to believe, and does believe, that any manufacturer or bottler of ale, porter, lager beer, soda, mineral water or other beverage, or any other person, is using, in any manner by this act declared to be unlawful, any of the casks, barrels, kegs, bottles or boxes of such person or his principal, or that any junk dealer or dealer in casks, barrels, kegs, bottles or boxes, or any other dealer, manufacturer or bottler has any such cask, barrel, keg, bottle or box secreted in, about or upon his, her or their premises, the said justice of the peace or police magistrate shall issue his search-warrant and cause the premises designated to be searched as in other cases where search-warrants are issued, as is now provided by law; and in case any such cask, barrel, keg, bottle or box duly marked or stamped and registered as aforesaid, shall be found in, upon or about the premises so designated, the officer executing such search-warrant shall thereupon arrest the person or persons named in such search-warrant, and bring him, her or them before the justice of the peace or police magistrate who issued such warrant," etc.

The search-warrant provided for can be issued only at the instigation of the owner of the property to be searched for, or his agent, and, as already shown, is to be employed merely for the maintenance of his rights by making the officers of the State searchers for his bottles, kegs, etc. The premises of a citizen cannot be intruded upon, under a search-warrant, for any such private purpose. Bishop, in his work on Criminal Procedure (vol. 1, sec. 716), states the rule by quoting from the opinion in *Robinson v. Richardson*, 13 Gray, 454, as follows: "Search-warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings or for the maintenance of any mere private right,

but their use was confined to cases of public prosecutions instituted and pursued for the suppression of crime or the detection or punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because without them felons and other malefactors would escape detection." The record in this case illustrates the well-understood purpose of the act as well as the manner of its prosecution. The complaint and warrant are each a printed form not intended to describe a particular offense, but made in advance to fit all cases, ready to be sworn to, without regard to the facts of particular cases. The property charged to be in the possession of the defendant and directed to be seized and brought before the court is a part of the printed matter, for use on all occasions. The printed complaint describes the property as "four hundred of said bottles and forty of said cases and boxes," and the warrant as "said forty casks, barrels, kegs, boxes and said four hundred bottles, or some part thereof." No wonder there should be a variance between such an affidavit or warrant and the facts of the particular case, as there was here.

This section of our constitution is identical with the fourth amendment to the constitution of the United States, except that it substitutes the word "affidavit" for "oath or affirmation." It is a step beyond the constitution of the United States, in requiring the evidence of probable cause to be made a permanent record in the form of an affidavit, otherwise it is the same. It has been uniformly held, wherever the question has arisen under a statute or constitution containing such provision, that the oath or affirmation must show probable cause arising from facts within the knowledge of affiant, and must exhibit the facts upon which the belief is based, and that his mere belief is not sufficient. *United States v. Tureaud*, 20 Fed. Rep. 621; *Johnson v. United States*, 87 id. 187. The constitutional provisions on this subject had their origin in the abuse of executive authority, and their design is to substitute judicial discretion for arbitrary power, so that the security of the citizen in his property shall not be at the mercy of individuals or officers. The

general statute authorizing search-warrants, contained in the Criminal Code, fully recognizes this rule by the requirement that the judge or justice of the peace shall be satisfied that there is reasonable cause for the belief of the affiant, before he shall issue his warrant. Wherever a statute requires probable cause, supported by oath or affirmation, the complaint must set up facts and cannot rest on mere belief, which will not satisfy the requirement. *Blythe v. Tompkins*, 2 Abb. Pr. 468; *People v. Heffron*, 53 Mich. 527; *Ex parte Dimmig*, 74 Cal. 164. A search-warrant can only be granted after a showing made before a magistrate, under oath, that a crime has been committed, and the law, in requiring a showing of probable cause, supported by affidavit, intends that facts shall be stated which shall satisfy the magistrate that suspicion is well founded. The mere expression of opinion, under oath, is no ground for the warrant, except as the facts justify it. Cooley's Const. Lim. (4th ed.) 372. "The warrant is not allowed to obtain evidence of an intended crime, but only after lawful evidence of an offense actually committed." Ibid. 374. The act now under consideration does not even require an affidavit that any offense has been committed, and an affidavit which fulfills its conditions belongs to a class universally condemned by every authority, when used to disturb a citizen in the security guaranteed him by the constitution. It requires nothing but the belief of the party making the affidavit, and, as he is not required to state any fact or satisfy the magistrate that there is reasonable ground for his belief, he may just as well swear by wholesale, according to the printed form, to four hundred bottles and forty kegs as to his affidavit to the facts of a particular case. The act attempts to transfer the judicial discretion, which the constitution intended should be exercised by the magistrate, from that officer to the party making the affidavit. The vesting of such discretion in the magistrate has been the main purpose of constitutional provisions of this character, while this act destroys the protection secured and permits the affiant to pass upon the question of probable cause.

The search-warrant appears to be intended as a means of collecting evidence. The act not only avoids the requirement of an affidavit that any crime has been committed, but it only pro-

vides that the party accused shall be arrested in case beer bottles, or other property described in the act, is found about his premises, and when such property is brought before the court the act makes no provision for the disposition of it. It is only after a search by the officer for bottles, kegs and the like that he learns whether he is to arrest the defendant or not, and if he fails to find them no arrest is to be made. This shows that the object of the search-warrant is to obtain evidence, and if it is not obtained, that is the end of the prosecution. Such a search is an unreasonable one. In *Glennon v. Britton*, 155 Ill. 232, the proceeding was against the offending thing itself, where the public was interested in its destruction for the purpose of stopping immoral practices and crime, and it was immaterial whether service was had on the person in whose possession it might be found. There is no such element in this case, but the only purpose is to aid the individual to collect his property. The search provided for in the act is unreasonable, under the authorities, for the reasons we have given, and the provision is in violation of the constitution.

These questions were neither considered, nor decided in *People v. Cannon*, 139 N. Y. 32, which is the main reliance of counsel to sustain this act. The New York statute is much more comprehensive than this act and includes dealers in milk and cream and manufacturers and dealers in medicines, medical preparations, perfumery and compounds or mixtures, well as those embraced in the terms of this act. The validity of that statute was tested on the claims that it granted a monopoly to the manufacturers of beverages by prohibiting the resale or gift by a purchaser of the contents of a bottle which the manufacturer refused to sell, and that it destroyed or unlawfully decreased the trade in empty bottles which is a legitimate trade and entitled to the equal protection of the law. The statute was held not subject to the first objection, and it was said that a buyer of the contents could sell the same in the bottle and deliver the bottle with the contents. As to the second objection, it was held that the additional care required of a dealer in buying empty bottles was not an unreasonable restriction. The statute only applied where the bottle was not purchased with the contents from the person or corporation whose trade-mark

was on it, and in the three cases heard together the judgments in two were reversed because there had been deposits of money as security for the return of the bottles, which amounted to a conditional sale of them. The decision is not an authority on any proposition in this case.

The judgment is reversed. Judgment reversed.

NOTES UPON THE LAW RELATING TO CRIMINAL COMPLAINTS (by J. F. G.). Although the act in question was designed for a particular class of search-warrants, the decision in the *Lippman Case* is based upon the right of the people to "be secure in their persons, houses, papers and effects against unreasonable searches and seizures," and is an authority of more than ordinary value, not only as to search-warrant proceedings, but in any case where process issues on oath, affirmation or affidavit for the seizure of a person or persons. It matters not whether such process issues from a justice of the peace upon a criminal or supposed criminal charge or from a court of record, as a writ in a civil case, the application of the doctrine must be the same.

In these notes we shall treat of the subject principally as it applies to criminal complaints.

While it is generally conceded that no warrant shall issue except upon a charge made under oath, the practice as to how such oath shall be made depends largely upon the provisions of the constitution or the statutes controlling the tribunal from which the warrant is prayed.

By the fourth amendment of the United States constitution, it is provided "that no warrant shall issue but upon probable cause supported by oath or affirmation," which requirement might be fully complied with in proceedings before a United States commissioner by simply hearing the oral testimony, unless such practice would be contrary to the practice of the State in which the commissioner at the time is sitting (U. S. R. S., sec. 1014). In this regard the constitution of Wisconsin is identical with the fourth amendment of the United States constitution; and it is there held that the complaint itself need not be under oath; but that the magistrate may call in witnesses and examine them, and on such oral testimony base a warrant. *State v. Davies*, 62 Wis. 305.

The corresponding provision in the Michigan constitution is the same as that of the Federal and of the Wisconsin constitutions. The Michigan statutes controlling proceedings before an examining magistrate provide that, upon complaint being made, the magistrate shall examine the complainant and any witnesses produced by him, and if cause is shown shall issue a warrant. In construing this statute, it has been held that, although a complaint is a necessary prerequisite to authorize a magistrate to hear testimony as a basis for warrant, the complaint need not be under oath, nor reduced to writing; but that the warrant issues on, and must accord with, the oral testimony, and may be for an offense of a different grade or name. *People v. Kuhler*, 93 Mich. 626; *People v. Evans*, 72 Mich. 385; *Stuart v. People*, 42 Mich.

255; *Yance v. People*, 34 Mich. 286; *Turner v. People*, 33 Mich. 309. Thus a man may complain that three men assaulted and endeavored to kill him, but upon hearing of the testimony in the *ex parte* proceeding the magistrate may issue a warrant for riot.

A review of the Illinois constitutions, statutes and decisions.—Section 7, article 8, of the Illinois constitution of 1818, reads as follows:

"That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants whereby an officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted."

Following the adoption of the constitution in 1818, the first general assembly, on March 23, 1819, enacted, "That it shall be lawful for any justice of the peace, upon oath being made before him," etc., to issue a warrant (Laws of 1819, p. 193), which was re-enacted in the Act of February, 1823.

With the constitution and statutes reading as above, the Supreme Court, at the December term, 1822, held that an action for false imprisonment could be maintained against a justice of the peace who issued a warrant, based upon an affidavit, which on its face did not state facts constituting a crime (*Moore v. Watts*, Breese, 18; B. B. 42); but at the December term, 1826, it held that a declaration in trespass was bad on demurrer, where it averred, in a suit against both the justice and constable, that the warrant directed the arrest of the plaintiff, "to answer the complaint of Edward Valentine in a case of assault and battery, and threats of his life, on the night of the 18th of this instant, wherein he has this day personally appeared before me, and solemnly swore that they struck, kicked and whipped him, so as to mangle his body most cruelly." *Flack v. Ackney*, Breese, 144; B. B. 187. In the latter case we are not informed whether or not the complaint was in writing; but in another case decided at the same term there is a strong implication that it should be. *Flack v. Harrington*, Breese, 165; B. B. 213.

The act of January 6, 1827 (Revised Code of Laws, 1827, p. 170), was somewhat broader in its language than the previous statute. It provided as follows:

Sec. 3. "It shall be lawful for any of the aforementioned judges or justice of the peace, upon oath or affirmation being made before him, that any person or persons have committed any criminal offense in this State, or that a criminal offense has been committed, and that the witness or witnesses have reasonable grounds to suspect that such person or persons have committed the same, to issue his warrant under his hand," etc.

Under this act it would seem that the warrant would issue on the evidence of a witness or witnesses, whether such evidence be oral or in writing; but upon this statute we do not find any adjudicated case.

The constitution of 1848 adopted the language of that of 1818, above

quoted; but the doubt was finally settled by the constitution of 1870, section 6, of the Bill of Rights, being as follows:

"The right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched and the persons or things to be seized." The constitutions of 1818 and 1848 required that the probable cause for the issuance of a warrant should appear by evidence; and that any warrant issuing without such evidence is "dangerous to liberty, and ought not to be granted." Not in the least is this rule relaxed by section 6 of the Bill of Rights; but the guaranty is made stronger by the additional requirement that such evidence shall be by "affidavit." An affidavit is a statement of facts, material to the matter under inquiry, expressed in writing, with that degree of certainty and clearness that if falsely made affiant may be punished for perjury. *Myers v. People*, 67 Ill. 503; *People v. Becker*, 20 N. Y. 354; *Miller v. Munson*, 34 Wis. 579; *Neal v. Gordon*, 60 Ga. 112; *Ex parte Lane*, 6 Fed. Rep. 34; *Ex parte Dimmig*, 74 Cal. 164; *People v. Heffron*, 53 Mich. 527; Judge McAllister's opinion in *People ex rel. Smith v. Brown*, 6 Chi. Legal News, 392, ante, p. 354.

Sec. 2, div. 7, of the Criminal Code, was evidently drafted under a misapprehension or oversight of section 6 of the Bill of Rights, for that section reads as follows:

"Upon complaint being made to any such judge or justice of the peace, that any such criminal offense has been committed, he shall examine on oath the complaint and any witness produced by him, shall reduce the complaint to writing and cause it to be subscribed and sworn to by the complainant; which complaint shall contain a concise statement of the offense charged to have been committed, and the name of the person accused, and that the complainant has just and reasonable grounds to believe that such person committed the offense."

The general assembly may increase the guaranties of personal security; but it cannot curtail or abridge any rights declared by the constitution. It may be that an oral examination under oath of the complainant and his witnesses is a necessary prerequisite to the drafting of the complaint, and that an additional oath must be then administered when the complaint is signed; but if the complainant signs and swears to a complaint, basing his oath simply upon the evidence of other witnesses, such complaint does not possess the character of an affidavit, and is not a strict compliance with the requirement of the constitution, because he could not be held responsible, under an indictment for perjury, for a false statement made by one or more of his witnesses. It would seem that, to comply with the present constitution of Illinois, the statements of each witness should be reduced to writing, signed and sworn to by the witness making such statement; otherwise the probable cause does not appear by affidavit. In cases under division 9 of the Criminal Code, where a justice has final jurisdiction, simply an affidavit is required. Compare section 1, division 5, of the Criminal Code, in relation to peace warrants, and section 1,

division 8, of the Criminal Code, in relation to search-warrants, with section 6 of the Bill of Rights.

A very interesting and instructive case upon this subject is that of *Housh v. People*, 75 Ill. 487. A constable by the name of Thurman arrested a man answering to the description given in the State warrant, and delivered the prisoner to Housh, who was also a constable. The prisoner escaped, and Housh was indicted and convicted for permitting such escape. The warrant in question was based upon a complaint which read as follows:

"STATE OF ILLINOIS, }
Knox County, } ss.

"The complaint and information of George Huggins, of Knox township in said county, made before James Moore, Esquire, one of the justices of the peace in and for said county, on the sixth day of May, 1873, who, being duly sworn, upon his oath says that, in Knox township, in the said county, on the 25th day of April, 1873, he had a saddle and sheep skin stolen from his barn in said place, and that he verily believes they are now in possession of a man, name unknown, a large size man, riding a sorrel mare with a light mane and tail, and young colt running after, when last seen; who stayed last night at Edmund Russel's, in Persifer township, this county. He therefore prays that the said unknown described man may be arrested, and dealt with according to law.

"GEORGE HUGGINS.

"Subscribed and sworn to before me, this sixth day of May, 1873.

"JAMES MOORE,

"Justice of the Peace."

The court held that the complaint was insufficient to comply with section 6 of the Bill of Rights, the court saying: "From aught that appears in this affidavit, the prisoner may have honestly come to the possession of the property claimed to have been stolen, by purchase, or by borrowing or finding it, and this may have been known to the person making the affidavit. There is nothing in the affidavit necessarily inconsistent with this idea. Without saying more, it is sufficient that, in our opinion, the affidavit was insufficient to give jurisdiction for the purpose of issuing the warrant."

The court further held that, as the warrant was regular upon its face, the constable, Housh, would have been protected from an action of false imprisonment; but that, as the warrant was based upon an insufficient affidavit, which did not give the justice jurisdiction, that he was justified in permitting the prisoner to escape. The conviction was reversed.

The Schustek Case.—As a concise, comprehensive and correct exposition of the law relating to criminal complaints, there are but few, if any, opinions superior, if equal, to that of Judge Chetlain, rendered as presiding judge of the Criminal Court of Cook County, in discharging John Schustek upon a writ of *habeas corpus* in September, 1896. It appears in full in the *Chicago Law Journal* (Weekly) of September 25, 1896, *Chicago Law Journal* (Monthly), October, No. 1896, *People ex rel Schustek v. Pease*, 29 *Chicago Legal News*, 33, and *Detroit Daily*

Legal News of October 3, 1896. We here give the opinion complete:

CHETLAIN, J. In order to confer jurisdiction upon a justice of the peace, a criminal complaint must contain:

1st. A concise statement of facts under oath. The facts constituting the offense should be set out positively. It is not sufficient that the facts be stated upon information and belief, nor that the complainant "has just and reasonable grounds to believe" that the facts constituting the offense are true. The statute of this State contemplates such a definite statement of facts as could be made the basis of a prosecution for perjury, if false.

2d. It must definitely appear that a crime has been committed.

3d. And that there is probable cause for believing that the defendant is guilty.

In the case at bar, the complaining witness in effect has only stated that he "has just and reasonable grounds to believe" that a crime has been committed, which amounts to nothing more than the statement of the witness on information and belief. In this case the facts constituting the crime are perhaps sufficiently set out, and the complaint would be sufficient, if, in addition to such statement, the complainant had set out in detail facts upon which he based his belief sufficient to show probable cause. It should appear that the reasons for arresting the defendant are not based upon mere rumor or suspicion, and in setting forth such reasons facts should be set out to negative the idea of rumor or suspicion, and to make it appear to the court that the complaint is based on something besides information, or belief, or rumor, or suspicion.

In my opinion the *mittimus* in this case is very irregular, if not fatally defective. It recites that John Schustek was examined on a charge preferred against him upon a complaint in writing, under oath of one Imrich Podkrivacky, and that it appeared probable from the evidence of said witness, sworn and examined before the justice, that said John Schustek was guilty of said charge. The conclusion to be drawn therefrom is that the defendant John Schustek was committed only upon his own testimony, which would be clearly illegal. *Boone v. The People*, 148 Ill. 440. As will be observed, the *mittimus* recites the mere probability that a crime was committed. The mere probability that a crime was committed is not sufficient ground for holding the defendant to the grand jury. It should appear from a *mittimus*:

1st. That crime was committed by some one.

2d. That it was probable that the defendant was the guilty party. Probable cause refers to the guilt of the defendant and not to the commission of the crime itself.

For the reasons stated, the relator is discharged.

Complaints on information and belief.—There are numerous authorities in line with the *Lippman Case* and the *Schustek Case*, in holding that a complaint which simply charges that the complainant verily believes or has good reasons to believe the statements in the complaint is not sufficient to give jurisdiction, and that any warrant issuing thereon is void.

In *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. Rep. 619, it was held that a warrant issued upon a charge of murder was void and the prisoner entitled to a discharge on a writ of *habeas corpus*, because the complaint upon which it was founded was simply made on information and belief.

In *United States v. Collins*, 79 Fed. Rep. 65, the defendant was indicted for obstructing justice by refusing to produce a letter in evidence in a supposed criminal proceeding before a United States commissioner; but as the proceedings before the commissioner were based upon a complaint made on information and belief, the court quashed the indictment; holding that, as the commissioner had no jurisdiction over the defendant, he had none over the witness Collins; and that Collins was not obliged to produce the letter to be used in evidence in a void proceeding. In that case there was nothing to show that the defendant in the proceedings before the commissioner had made any objection; but the judge evidently based his opinion upon the theory that, if a proceeding is void, consent cannot confer jurisdiction.

In *Ex parte Lane*, 6 Fed. Rep. 34, an extradition proceeding was held void, and the prisoner discharged because of the same defect in the complaint.

In *Ex parte Hart*, 11 C. C. A. 165, 63 Fed. Rep. 249, the United States court of appeals announced the same doctrine in discharging a prisoner held on an extradition warrant. This case is more extensively reviewed on pages 308, 309, 310 of vol. 10, American Criminal Reports.

In treating of this subject in *United States v. Sapinkow*, 90 Fed. Rep. 654, Judge Thomas said: "Aside from the questions discussed, it is claimed that the warrant of arrest was issued without jurisdiction, because the complaint herein was not on such oath as is required by the United States constitution and the Revised Statutes (sec. 1014). The warrant is issued on the complaint of one Kassel, a private citizen, and all the statements of alleged fact rest upon information and belief. No grounds of information are stated, but deponent's belief is stated to be based upon falsely made cigarettes (whatever that means) purporting to be his (deponent's intending) manufacture, which were not his manufacture, and which bore deponent's stamps, which cigarettes had been sold by the defendant.' How did the deponent know that the defendant sold these false cigarettes? He has just sworn to the fact on information and belief. Is he using alleged facts, which he knows only on information and belief, as a statement of the bases of his belief? It appears so to the court. Without examining the decisions cited by the learned counsel for the defendant, it is evident that the complainant has not stated any grounds either for his information or belief. Did he know where defendant's place of manufacture was? Did he know or hear of the defendant doing any of the acts alleged against him? Did he see any of the cigarettes sold? Does he know or hear of any fact or circumstance in any degree connecting the defendant with any of the transactions alleged on information and belief? If so, why did he not state when and where he derived his knowledge? As his affidavit stands, the deponent has stated on his information and belief that the defendant

was guilty of various acts and omissions, but he fails utterly to give the slightest substantiation of such information and belief, or either."

Upon this subject see also *People ex rel. O'Neill v. Shields*, 30 Chi. Legal News, 340; *Ex parte Smith*, 3 McLean, 121; *In re Coleman*, 15 Blatch. 406; *United States v. Tureaud*, 20 Fed. Rep. 621; *State v. Dan Good*, 77 Tenn. 250.

A complaint which does not state the facts is insufficient.—The following is the opinion in full in *State v. Fiske*, 20 R. I. 416, 28 Atl. Rep. 348:

TILLINGHAST, J. The complaint in this case charges that the defendant "was found behaving in a noisy and disorderly and indecent manner, and did assist, encourage and promote the same to be done by others, to the annoyance and disturbance of a portion of the peaceable inhabitants of the town of East Greenwich, against the ordinances of the said town." At the trial of the case in the court of common pleas, the defendant moved that the complaint be quashed on the ground of duplicity, and also for uncertainty in charging the offense, which motion was overruled, whereupon the defendant was tried and found guilty as charged. The defendant then moved in arrest of judgment on the same ground as above stated, which motion was also overruled, to each of which said rulings exception was duly taken. The case is now before this court on exceptions to said rulings, and also to the ruling of the court excluding certain testimony offered by the defendant at said trial. We think the complaint is insufficient on the ground of uncertainty. It fails to inform the defendant of the particular offense for which he is to be tried, in that the language used, while following that of the ordinance, does not so far individuate the offense as to give the defendant proper notice of what it really is. In *Began, Petitioner*, 12 R. I. 309, this court, while holding that the word "revel" had a precise and definite meaning, yet intimated that it might be necessary in connection with the other charges in the complaint, which were quite similar to those in the case now before us, to particularly set forth the circumstances connected with the disorderly and indecent conduct set forth in the complaint. We think that to merely charge one with "behaving in a noisy, disorderly and indecent manner," without any specification as to what constituted such behavior, or even that it was in a public place in said town, is too vague and indefinite to answer the requirements of criminal pleading. *State v. Smith*, 17 R. I. 371, and cases cited; *McJunkins v. State*, 10 Ind. 140; *Bell v. State*, 1 Swan, 42.

As we are of the opinion that the complaint is insufficient for the reason above given, it is unnecessary to consider the other exceptions.

Exceptions to the overruling of defendant's motion in arrest of judgment sustained, and judgment arrested.

In *State v. Murray*, 41 Iowa, 530, the information (a complaint is called an information in Iowa) charged that the defendants "did wilfully and maliciously assault one Bridget McCoy, contrary to the statutes in such cases made and provided," etc. The defendants were convicted before a justice of the peace and appealed. In the district court they demurred to the information, which demurrer was over-

ruled; and upon trial the defendants were again convicted, and appealed to the Supreme Court, where the judgment was reversed, the following being the opinion in full:

MILLER, C. J. Section 5057 of the Revision (Code, sec. 4662) provides that an information before a justice of the peace, charging the commission of a public offense, "must contain . . . a statement of the acts constituting the offense in ordinary and concise language, and the time in and place of the commission of the offense, as near as may be.

The information in this case fails to comply with this provision of the statute, in that the "acts constituting the offense" are not stated therein. It accuses the defendants with committing an assault, for that they committed an assault. It would not do to accuse a person with the crime of larceny, and merely allege that he committed larceny at a time and place stated. The acts which in law constitute larceny must be alleged. So in respect to every criminal offense. It will not do to accuse a party with the commission of a crime by its technical name merely. The acts which make up the offense must be charged. *This was so without the statute.* The judgment must be reversed.

In *Cranor v. State*, 39 Ind. 64, a complaint for assault, charging it to be committed by "running a horse against and over Elizabeth Golden," was held insufficient in that it did not comply with the statutory definition of assault, and charge that it was done in a rude, insolent, or angry manner. To the same effect, see *Slusser v. State*, 71 Ind. 280.

To constitute a valid complaint for perjury, the false testimony should be set out.—Two persons were arrested upon a joint accusation of perjury, charging that they wilfully, corruptly testified falsely in a divorce proceeding to a matter material to the issues. Upon a continuance of the hearing by the justice, they declined to give bail and sued out a writ of *habeas corpus* before Judge Baker, then presiding in the Criminal Court of Cook County, who discharged them. The judge held, citing *Housh v. People*, *supra*, that the facts constituting the offense should be set out; and that, as the false testimony was not set out, there was nothing to show as to whether or not it could have been material to the issues, and that the complaint was void. The prosecuting attorney suggested the statute of amendments, but the judge replied that where there was no jurisdiction there was nothing to amend. *Ex parte Czack*, Chi. Law Bul., April 11, 1896.

In the *Warenzak Case*, Chi. Law Bul., April 26, 1897, a similar application was made to Judge Chetlain; the charging part of the complaint being as follows: "Said complainant, being duly sworn upon his oath, says that on, to wit, the thirteenth day of April, 1897, and in the county aforesaid, Antoni Warenzek, having taken a lawful oath in a judicial proceeding before Waldemar Bauer, justice of the peace, in a matter where by law an oath was required, swore falsely in a matter material to the issues or point in question." In a short written opinion the court said: "The complaint does not comply with the requirements of the Bill of Rights, section VI, and section II, division VII, of the Criminal Code, and therefore did not confer any authority upon the justice to issue his warrant for the arrest of the relator. The com-

plaint does not contain a concise statement of facts regarding the supposed offense, and does not set out the supposed false matter testified to by the relator upon which a charge of perjury was claimed to be based; accordingly the justice had no authority to issue the warrant, and all of his proceedings upon the complaint were without jurisdiction and void. *Ex parte Ozack*, Chi. Law Bul., April 11, 1896; *Moore v. Watts*, Breeze, 18; *Housh v. The People*, 75 Ill. 487; *Ex parte Dimmig*, 74 Cal. 164."

A printed form made to fit all cases alike, with blanks for dates and names, is not a good criminal complaint.—The following is the opinion, in part, in *Sarah Way's Case*, 41 Mich. 299 (also reported as *In re May*, 1 N. W. Rep. 1021):

CAMPBELL, C. J. Sarah Way was brought before us on return to a *habeas corpus*, as confined in the Detroit house of correction on a conviction of vagrancy, set out as committed "in violation of section 1, chapter 78, title 8, pages 175 and 176 of Revised Ordinances of said city, contrary to the ordinances of said city in such case made and provided."

It appears from the commitment that she had been arrested and confined in the station-house before any complaint; that a complaint was then made by Charles E. Reynolds, a policeman, which contains no specific facts, but swears positively, and therefore on his responsibility for the oath, that on the 15th day of May, 1879, and for one month preceding, she was unlawfully and wilfully guilty of vagrancy, for that, she being an able-bodied person, had been during that period, in said city, lodging, loitering and rambling about from place to place, neglecting all lawful calling and employment, and not having any home or visible means of support, and not giving a good account of herself.

The remarkable character of such a complaint is only explained by the fact that it is entirely a printed form, except as to names and dates. It certainly is not such a document as ought to be presented under the constitutional provision requiring that no warrant shall issue without probable cause. Such comprehensive and wholesale swearing to a whole catalogue of conditions, some of which cannot possibly have been known to the complainant, and none of which are specific, and the habitual use of such documents, evident from the printed forms of complaint and commitment, are not calculated to recommend the proceedings to favorable consideration. (The remainder of the opinion was on other subjects, among them the rule as to arrests without warrants, holding that it does not apply to vagrancy.) The relator was discharged.

Where a complaint is under oath, the complainant must be a competent witness.—Except in matters of personal violence, or in an application for a peace warrant, neither husband nor wife can be a complainant against the other. *Long's Case*, 32 Chi. Legal News, 58; *Taulman v. State*, 37 Ind. 353; *State v. Berlin*, 42 Mo. 572; *Mountz et al. v. The Jailer*, 1 Grant (Pa.), 218.

The statement of facts in a criminal complaint should be as full and clear as required in an indictment.—It is generally contended that an indictment should be more specific than is required for a criminal

complaint; but while this may be true as to formal matters, the statement of facts in a criminal complaint should show clearly a cause for action. An indictment is the report, or presentation by the grand jury, based upon oral testimony heard by the grand jury; but a criminal complaint, at least where an affidavit is required, is the evidence upon which the warrant issues. In *People v. Brady*, 56 N. Y. 182 (190), the New York court of appeals held that the statement of facts in a complaint should be as full, at least, as in an indictment. See also *Van-dever v. State*, present volume, p. 355.

Can a criminal complaint be amended?—As to whether a defective complaint can be amended, and if so, to what extent, and under what circumstances, is a subject on which the courts do not agree. The logical inference is that, if a cause for arrest is not shown, the entire proceeding is void; and if void, there is no charge to amend. In *Torrey & Glenn v. People*, 17 Ill. 105, a conviction was reversed, without remanding, because the complaint lacked in one essential element, the court saying that "the accusation did not amount to an offense against the public law, and no sufficient charge was made by amendment;" but it does not appear that the subject of amendment had been discussed in the argument. In *Truitt v. People*, 88 Ill. 518, it was held that complaints could be amended, because common-law informations could be amended; the court evidently not taking into consideration the fact that there is a wide distinction between common-law informations, made by an officer of the Crown, and criminal complaints; the information being of the nature of a pleading, while a complaint is a synopsis of evidence made upon oath of an individual. In *Maynard v. People*, 135 Ill. 416, it was sought to reverse a conviction of perjury upon the ground that the false testimony was given in a bastardy case, based upon a defective complaint; the court held that, although the warrant should not have issued, because of a defect in the complaint, yet that which was omitted was inferred from certain language in the complaint, and that, as the action was a civil action, the same could have been amended, and accordingly was not void. The court, however, said: "That which is absolutely void is not amendable, but that which is voidable, merely, can be amended." The above decisions should be received with great caution; for, if they are not overruled, the doctrines announced are certainly modified by the decision in *Lippman v. People* (*supra*); and we may draw this conclusion: that in any case where a writ of *habeas corpus* should be sustained for want of jurisdiction, that the proceeding under the complaint is void, and that the complaint cannot be amended. Where a complaint charges the essential element of the offense, such as larceny of property, without describing the property, it may be proper to amend the complaint by giving such description, simply as a matter of good pleading, or furnishing of a bill of particulars; for that only makes specific that which is already alleged.

The popular notion that a strict compliance with the constitutional guaranties of personal security encourages the commission of crime and the escape of criminals is untenable. Many of those criminals whose conduct is the most detrimental to society have no more desire

to flee from justice than an approving public has to prosecute; while the unpopular criminal, who commits robbery, burglary or murder, where the offense is recent, may on reasonable suspicion be apprehended without the issuance of a warrant. 4 Blackstone, 295; *Shanley v. Wells*, 71 Ill. 78.

Other interesting cases upon this subject are: *State v. Whittaker*, 85 N. C. 566; *Armstrong v. Van De Vanter*, 21 Wash. 682, 59 Pac. Rep. 510; *People v. Novak*, 24 N. Y. St. Rep. 274; *In re Harris*, 32 Fed. Rep. 583; *People v. Cramer*, 47 N. Y. S. 1039, 27 App. Div. 189; *State v. Dale*, 3 Wis. 795; *Fink v. Milwaukee*, 17 Wis. 26; *Jansen v. State*, 60 Wis. 577; *People v. Heffron*, 53 Mich. 527; *State v. Smith*, 21 Neb. 552, 32 N. W. Rep. 594; *Thrash v. Bennett*, 57 Ala. 156; *Ex parte Morgan*, 20 Fed. Rep. 298; *Town of Whiting v. Doob*, 152 Ind. 157; *City of Holden v. Bimrod*, 60 Kan. 861, 61 Kan. 13, 18 Pac. Rep. 558; *Hawthorne v. State*, 6 Tex. App. 562; *Commonwealth v. Clement*, 8 Pa. Dist. Rep. 705; *Ackerman v. City of Lima*, 8 Ohio S. & C. P. Dec. 430; *State v. Carter*, 39 Me. 262; *State v. Spencer*, 38 Me. 30.

The doctrine as applied to search-warrants.—The description of the property should be as definite as that of property in a conveyance. To describe the property as "the houses and buildings of Henry Ide" is insufficient. *Humes v. Tabor*, 1 R. I. 464. So also is the description, "The premises of Aaron Hyatt in said Milton and other suspected places, houses, stores or barns in said Milton." *Gramon v. Ramond*, 1 Conn. 40. So also, "The premises of John Doe, alias, in the town of B., or in the neighborhood thereof, in the county of S." *Ashley v. Peters*, 25 Wis. 621. Unless the warrant shows the preliminary proceedings, the examination of three witnesses, etc., it is ill, and no presumption is indulged in favor of the justice. *State v. Staples*, 37 Me. 228. The affidavit must be positive in its form, and a statement on belief as to the place of concealment is insufficient. *White v. Wager*, 83 Ill. App. 592. While great strictness is required in the description of property alleged to be stolen, less particularity is required for the seizure of gambling implements, where a general description is sufficient.

The same doctrine applied to civil cases.—It was held by the Supreme Court of Michigan that an affidavit on information and belief was insufficient to sustain a *capias* for the arrest of the defendant (*Shaw v. Ashford*, 68 N. W. Rep. 281); and by the Supreme Court of South Dakota, that such affidavit was bad even though made in the positive form, if from the facts stated it would appear to have been made upon information. *Hart v. Grant*, 8 S. D. 248, 66 N. W. Rep. 322. Where, in the early history of Illinois, the statutes provided for an insufficient affidavit, even after a practice of thirty years the Supreme Court held that the defendant could be discharged upon *habeas corpus* (*Ex parte Smith*, 16 Ill. 347), and that the sheriff was not liable if of his own volition he released the prisoner (*Tuttle v. Wilson*, 24 Ill. 553), which was his duty to do if the defect appeared on the face of the *capias* (*Gordon v. Frizzell*, 20 Ill. 291); and that if the prisoner gave bail, the bond was void. *Stafford v. Low*, 20 Ill. 152. In *Townsend v. Burns*, 2 Crompt. & J. 468, Baron Vaughan said: "Affidavits to

hold to bail must be clear and distinct, and must aver whatever is necessary to show plaintiff's right of action." In treating of the same subject, in *Taylor v. Forbes*, 11 East, 315, Lord Ellenborough said: "The strictness required in these affidavits is not only to guard defendants against perjury, but also against any misconception of the law by those who make the affidavits. And the leaning of my mind is always to great strictness of construction where one party is to be deprived of his liberty by the act of another."

If an affidavit required in a civil case is made by an attorney, the presumption is that it was made on information and belief, unless the contrary appears. *Crowns v. Vail*, 51 Hun. 204. It is not sufficient for an attorney, when making an affidavit for a client, to state that he is well acquainted with the facts, but he must show how he is so acquainted. *Carter v. Rathbone*, 1 Hill, 204; *Cribben v. Schillenger*, 30 Hun, 248; *Cowles v. Harding*, 79 N. C. 577; *Wodien v. Hunt*, 4 Iowa, 355. See, also, *Bank of Pittsburg v. Murphy*, 18 N. Y. Supp. 575; *Van Egan v. Herold*, 19 N. Y. S. 456; *Talbert v. Strom*, 21 N. Y. S. 719. The attorney should show why he makes the affidavit instead of his client. *Griel v. Backius*, 114 Pa. St. 187. An agent should set forth his source of knowledge. *Hamilton v. Steamboat Ironton*, 19 Mo. 523.

STATE v. QUINTINI.

76 Miss. 498—25 So. Rep. 365.

Decided March 27, 1899.

CRIMINAL COMPLAINTS: Abbreviations—Information and belief.

1. In a criminal complaint the name of the month should be written in full, but if only an ordinary abbreviation is used, it can be amended.
2. A criminal complaint can be made on information and belief.

Appeal from Circuit Court of Hancock County; Hon. Thaddeus A. Wood, Judge.

This was an appeal taken by the State from the judgment of the court below in quashing the complaint.

Wiley N. Nash, Attorney-General, for State.

No appearance for appellee.

TERRAL, J. Augustine Quintini was tried and convicted before Edwin P. Laizer, a justice of the peace of Hancock county, of an assault and battery upon Henry Bosette, and fined five

dollars, from which conviction he appealed to the circuit court of said county, where, on motion of the said Quintini, the affidavit was quashed, and the defendant discharged.

The affidavit is in these words:

"THE STATE OF MISSISSIPPI, }
Hancock County.

"Before me, Edwin Laizer, a justice of the peace for the fifth district of said county and State, Albert J. Carver, constable, on information and belief, makes oath that Augustine Quintini did, on the 11th day of Aug., 1898, in the fifth district of Hancock county, Miss., within the limits of said justice of the peace jurisdiction, and within the limits of the city of Bay St. Louis, assault and beat Henry Bosette, against the peace and dignity of the State of Mississippi.

"ALBERT J. CARVER, Constable.

"Subscribed and sworn to before me this 12th day of Aug., 1898.

"EDWIN P. LAIZER, J. P.

The grounds of the action of the learned circuit court are not given in the judgment, and we are left to conjecture their nature.

The abbreviations of the names of the month of August and of the State of Mississippi are objectionable, but if the motion was sustained on that ground, the State should have been given leave to amend the affidavit.

The affidavit expresses the charge of the crime in the words of the best authors, and concludes as required by the constitution, and we find no objection to it on that account.

The brief of the attorney-general says that he is informed by the district attorney that the affidavit was quashed because it was not made on the personal knowledge of the affiant.

The common law was ever jealous of the personal rights of the subject, and its principles in this respect are embodied in section 23 of the constitution, which secures all persons from arrest unless on probable cause supported by oath or affirmation.

In reference to prosecutions before justices of the peace, section 27 of the constitution provides that the proceedings in such cases shall be regulated by law, and section 2421, Code 1892, reads, that "on affidavit of the commission of a crime of which

he has jurisdiction lodged with a justice of the peace he shall try and dispose of the case according to law."

By the general principles of the common law every accusation of a crime against an accused person must be charged, directly and positively stating the nature and cause of the accusation, and our Bill of Rights does not impair these common-law principles. But neither the constitution nor section 2421, Code 1892, requires the affidavit to be sworn to by one having personal knowledge of the facts stated in it, nor do we see any reason for supplying such omission on the part of the legislature. The improbabilities of finding a person who knows all the facts of any crime, and who, if knowing them, would be willing to charge them in such language as imports undoubted guilt, possibly induced the legislature not to require personal knowledge in the affiant; and that the legislature did not intend the affidavit to be made on personal knowledge is evidenced by the repeated attempts of that body to have misdemeanors prosecuted before justices of the peace instead of before the circuit courts, as by the act which authorized grand juries to refer misdemeanors presented to them to the proper justice of the peace of the county for trial.

A person may be arrested only on probable cause, but probable cause in law is a charge of crime made on oath, without regard to the fact whether the oath is made on personal knowledge or upon information and belief merely. By common law certain officers made information without oath, and such unsworn information was probable cause by that law. Here Carver was a constable, a sworn officer of the law, and his affidavit, made upon information and belief, charging Quintini with a crime, was probable cause, and constituted a valid charge against Quintini for his arrest and trial. *State v. Davie*, 62 Wis. 305; Clark's Crim. Pro., sec. 230; *Bigham v. State*, 59 Miss. 529; *Coulter v. State*, 75 Miss. 356.

We are of the opinion that the circuit court erred in quashing the affidavit in this cause and in discharging the accused.

NOTE (by H. C. G.).—The fallacy of the foregoing opinion is apparent upon very slight inspection. Probably the case was well argued below, but in the Supreme Court it was an *ex parte* hearing. The excuse that a constable could make a complaint upon mere belief, be-

cause . . . by common law certain officers made information without oath, etc.," doubtless refers to the old exceptional English practice, by which the attorney-general was allowed to file information not under oath, *ex officio*, as the representative of the king, in cases of *great emergency* peculiarly and directly affecting the royal prerogatives, in the *court of the King's Bench*; this special privilege being conceded to the Crown because the slightest delay, by following the regular procedure, might be attended by fatal consequences to its prerogatives. (See notes to *Johnson v. United States*, *supra*, and 4 Blackstone, ch. 23, p. 308.) This special privilege of monarchy has no place or force in this country; and certainly it could not be concluded that because, under such circumstances, the attorney-general of England was allowed such a dangerous privilege, therefore a constable in this country could make a valid complaint upon mere opinion and belief, especially so when it does not appear that constables or other officers in England availed themselves of this royal precedent.

Furthermore, the complaint does not charge an offense; for, while the constable swears to his *belief* that an assault was made (not an actual assault), he does not aver his belief that it was an *unlawful* assault.

The authorities and notes on pages 349-380 should effectually dispose of doubts on this question; but we may casually remark that through some erratic lapse of tongue, reason or judicial imagination, this usually lucid and able court stultifies itself, as well as overrides the weight of sound judicial authority on this branch of criminal pleading. True, it opines that the nature and cause of every accusation must be *directly* and *positively* stated. Then, lapsing into a mythical mood, it assumes that this sounding mandate can be complied with by an informant possessing no personal knowledge of what he charges. It matters not whether the solemn affiant knew that an offense had *in fact* been committed. It may have been that a distressingly dramatic dream, instigated by mince pie and too liberal potations, or an over-sensitive condition of a brain harassed by visions of snakes or other hypnotic influences, or simply an old woman's tale,—that any or all of these, spiced with a little malice, constituted the inspiring source of his *direct* and *positive* belief. Apparently, in the judgment of the learned court, it was immaterial whether this imposing belief was founded on fact or fiction, provided it was *direct* and *positive*. The learned court might have added weight to its elucidations by reminding the unsuggestive reader, that the persons possessing the most conscientious, *direct* and *positive* impressions and beliefs concerning the shortcomings of their neighbors, are found in lunatic asylums.

BARFIELD V. STATE.

39 Tex. Crim. Rep. 342—45 S. W. Rep. 1015.

Decided May 25, 1898.

CRIMINAL COMPLAINTS: *Insufficiency.*

A criminal complaint is insufficient which omits the word "did" in charging the acts committed.

Appeal from the County Court of Crocket County; Hon. Charles E. Davidson, Judge.

F. H. Barfield, being convicted, and fined twenty-five dollars for carrying a pistol, appeals. Reversed.

W. W. Walling and Mann Trice, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of carrying on and about his person a pistol, and appeals.

Motion was made to quash the complaint because the word "did" was omitted from the charging part thereof. The omission of the word "did" in charging the acts committed, in an unbroken line of decisions, has been held to invalidate the information, complaint, or indictment, as the case may be. See *State v. Hutchinson*, 26 Tex. 111; *Edmondson v. State*, 41 Tex. 496; *Ewing v. State*, 1 Tex. Crim. App. 362; *Moore v. State*, 7 Tex. Crim. App. 42; *Walker v. State*, 9 Tex. Crim. App. 177; *Jester v. State*, 26 Tex. Crim. App. 369. The word "did" is an essential word in complaints, informations, and indictments, where the acts which constitute the offense are being set out or charged. Motion was made by appellant to quash the complaint on account of this omission, which was overruled by the court. This matter was again urged by a motion in arrest of judgment, and this was also overruled. The motion to quash should have been sustained, and, that being overruled, the motion in arrest of judgment should have been held good. It was unnecessary for this case to have been brought to this court. Had the complaint been quashed below, as it ought to have been, the county attorney could have taken another, and prose-

ented the case, without unnecessary delay. The judgment is reversed and the prosecution ordered dismissed.

Reversed and dismissed.

HURT, Presiding Judge, absent.

STATE v. CRUICKSHANK.

71 Vt. 94—42 Atl. Rep. 983.

Decided January 26, 1899.

CRIMINAL COMPLAINTS: *Complaint charging violation of city ordinance.*

A complaint charging a violation of a city ordinance should set out the ordinance, because the court does not take judicial notice of it.

The case was instituted in the City Court of the City of Barre by complaint. A demurrer to the complaint was overruled and exceptions taken. Reversed.

Richard A. Hoar, for the defendant, cited *State v. Soragon*, 40 Vt. 450; *Shanfelter v. Baltimore*, 80 Md. 483; *Harker v. Mayor*, 17 Wend. 199; *Keeler v. Millidge*, 4 Zab. 142; *Green v. Indianapolis*, 22 Ind. 192; *Porter v. Waring*, 69 N. Y. 250; 1 Dill. Mun. Corp., secs. 83, 414, 415; Bishop on Stat. Crimes, secs. 404—408; Wharton's Crim. Pl. & Pr. (9th ed.), 224, 225; 1 Arch. Crim. Pl. & Pr. 248.

G. T. Swasey and *John W. Gordon*, for the State, contended that although courts of general jurisdiction do not take judicial notice of city ordinances, a city court, which bears the same relation to them that a State court bears to the laws of the State, will,—citing *State v. Leiber*, 11 Iowa, 407; *Laporte v. Goodfellow*, 47 Iowa, 572; 1 Dill. Mun. Corp. (4th ed.), sec. 413; *City of Salomon v. Hughes*, 24 Kan. 211; *Lanfear v. Mestier*, 89 Am. Dec. 658 and note; Acts 1894, No. 165, sec. 77.

ROWELL, J. This complaint lacks substance. It alleges that the respondent did ride a bicycle along and upon the sidewalk on a certain street in the city of Barre, "in violation of sections

twenty-five and twenty-six of chapter thirteen of the ordinances of said city," *contra formam statuti*. It should have set out the ordinances, as the court cannot take judicial notice of them. *State v. Soragan*, 40 Vt. 450.

It properly concluded against the form of the statute. *State v. Soragan*. Perhaps it should also have concluded against the form of the ordinances.

Judgment reversed, demurrer sustained, complaint adjudged insufficient, and cause remanded.

NOTES (by J. F. G.).—While it must be presumed that the judge of a city court is conversant with all of the ordinances of the city in whose court he presides, such presumption cannot be indulged in of the court to which an appeal is taken; for it would be unreasonable to say that the judge of a county court of general jurisdiction, or the judges of the Supreme Court of the State, would be conversant with all of the ordinances of the cities, towns and villages within such county or State; hence such a record should be made as would fully set out the cause of action for the information of either of such appellant tribunals.

Where a civil suit is instituted by one individual against another, based on the performance or non-performance of a city ordinance, the ordinance must be pleaded. With at least equal force would this rule apply where the action is brought to impose a penalty against an alleged wrong-doer.

STATE V. EASTMAN.

60 Kan. 557—57 Pac. Rep. 109.

Decided May 6, 1899.

EMBEZZLEMENT: Agent—Criminal intent an essential ingredient—Omission of intent in the statute.

Where a statute provided that if any agent shall neglect or refuse to deliver to his employer, on conditions specified, any moneys, books, etc., received by virtue of his employment, etc., he shall be punished, etc., it was error not to instruct the jury that a felonious intent was necessary to render the defendant guilty, notwithstanding the statute was silent as to the intent.

Appeal from the District Court of Lyon County; Hon. W. A. Randolph, Judge. Reversed.

E. W. Cunningham and *C. B. Graves*, for the appellant.
A. A. Godard, Atty. Gen., and *S. S. Spencer*, Co. Atty., for the State.

DOSTER, C. J. This is an appeal from a judgment of conviction for the failure of the appellant as an agent to deliver to his employer on demand money which came to the possession of the agent by virtue of his agency. The statute under which the conviction was had is the last clause of section 95, chapter 100, General Statutes of 1897 (Gen. Stat. 1889, § 2220), which reads as follows:

"If any agent shall neglect or refuse to deliver to his employer or employers, on demand, any money, bank bills, treasury notes, promissory notes, evidences of debt, or other property which may or shall have come into his possession by virtue of such employment, office, or trust, after deducting his reasonable or lawful fees, charges or commissions for his services, unless the same shall have been lost by means beyond his control before he had opportunity to make delivery thereof to his employer or employers, or the employer or employers have permitted him to use the same, he shall upon conviction thereof be punished in the manner provided in this section for unlawfully converting such money or other property to his own use."

The principal claims of error arise upon the instructions of the court and upon the court's refusal of defendant's request for instructions. It will be observed that the above statute does not, in its phraseology, make a criminal intent an ingredient of the offense defined. The court in its instructions omitted to charge the jury that the possession of a criminal intent by the defendant was necessary to his conviction, and on the other hand refused the defendant's request for the following instruction: "An essential element in the crime charged in this case is a felonious intent, and before you can convict the defendant you must find from the evidence that he intended to convert to his own use the money of the prosecuting witness, and to cheat, wrong and defraud him." Other requests for instructions preferred by the defendant applied the theory of criminal intent as an ingredient of the crime charged to the special facts of the case as developed by the evidence. These were all refused.

The court erred in refusing to instruct the jury as requested. In *The State v. Brown*, 38 Kan. 390, 16 Pac. Rep. 259, the defendant was prosecuted for the offense of being drunk in a public highway. The defense made was ignorance upon the

part of the defendant of the intoxicating character of the liquor drunk by him. The court refused the defendant's offer of evidence to show his ignorance of the intoxicating character of the liquor, and instructed the jury: "The defendant's ignorance of the intoxicating character of the liquor drunk by him, if he did drink any such, is no excuse for any drunkenness resulting therefrom, if any did so result." These rulings were held to be erroneous. The question principally discussed by the court in its decision of the case was whether ignorance or mistake of fact will excuse the commission of an act otherwise criminal. It was held that it would do so. Some of the requests for instructions preferred by the defendant in this case raise again this identical question. This question, however, presents only a phase of the broader and more general one—whether intent to do wrong is a necessary element of crime. The general rule, of course, is that a guilty intent is a necessary ingredient of crime. Bishop, Stat. Crimes, §§ 132, 231, 351, 362. We do not understand it to be disputed in this case as a general proposition. However, its application to the case is denied because of the failure of the statute to declare intent to be an ingredient of the offense. There are some cases which hold that unless made so by statute a guilty intent is not necessary to the commission of offenses *mala prohibita*; that is, not inherently bad, only bad because prohibited. The offense charged against the defendant in this case is not bad merely because prohibited, but it is *malum in se*—bad in itself. It is a species of embezzlement, and is classified by the statute in immediate connection with the common-law forms of embezzlement, and the punishment ordained for its commission is the same as the punishment for embezzlement proper. We feel quite clear that the principle upon which *The State v. Brown*, *supra*, was decided applies in this case, and that the court should have instructed as the defendant requested.

The judgment of conviction is therefore reversed, with instruction to grant the defendant a new trial.

PEOPLE v. LAPIQUE.

120 Cal. 25—52 Pac. Rep. 40.

Decided February 3, 1898.

EMBEZZLEMENT: Defendant's claim of right.

A broker was authorized to get a certain price for property. He sold it for more, paying the specified price to the seller and keeping the surplus, under claim that it was his commission, and that he was entitled thereto under the contract. He was convicted of embezzling three hundred dollars, the money of the purchaser. *Held*, that, in view of defendant's claim, he was wrongly convicted.

John Lapique, convicted of embezzlement in the San Francisco Superior Court, appeals; Ed. A. Belcher, Judge. Reversed.

Henry E. Highton, for appellant.

W. F. Fitzgerald, Atty. Gen., and *C. N. Post*, Deputy Atty. Gen., for respondent.

THE COURT. The defendant has been convicted of the crime of embezzlement, and, taking the evidence in the record most strongly against him, it may be substantially summarized in a few words: Mrs. Mesple, owning a lodging house, and desiring to dispose of the same, authorized the defendant, in writing, to sell it for the sum of \$1,150. The defendant informed one Aden that the house could be purchased for \$1,450; and Aden, desiring to purchase, gave the defendant \$1,450 to pay to the owner as the purchase price. Defendant paid the owner \$1,150 for the house, and retained the \$300 to himself as commissions for his services. He is now charged with the embezzlement of this \$300, the information alleging the money to be the property of Aden, and the defendant to be Aden's agent. Whatever might be the legal liability of defendant for this money if litigation were inaugurated for its recovery in a civil action, we are not here to decide. Indeed, it may be admitted that defendant was guilty of a piece of sharp practice. Yet sharp practice may not constitute embezzlement, and we think there is no embezzlement disclosed by this record. At the trial, defendant admitted that he had retained the money, and claimed title

to it. And upon the authority of section 511 of the Penal Code we deem his claim of title of such a character as to create a good defense to the charge of embezzlement. That section provides: "Upon any indictment for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable." Defendant claims that by his contract with Mrs. Mesple he was entitled as commission for his services to any sum in excess of \$1,150 that he might obtain for the property. He further claims that Aden authorized him to pay \$1,450 for the property, and that under such circumstances, if he was successful in securing the property for a less sum, the difference was his profit upon the transaction. Conceding these claims to be untenable in law, still we do not think the jury was justified in saying by its verdict that defendant's claim of title was not made in good faith. The judgment and order are reversed, and the cause remanded.

NOTE (by H. C. G.).—It may be observed that in the above case the defendant was not a servant nor an employee of the prosecuting witness, but acted rather in the capacity of a broker or independent agent, and would not be liable at common law, nor under the original statutes, of embezzlement, and would only become liable under special provisions of statute. See *Commonwealth v. Stearns*, 2 Met. 343, one of the leading cases, in which it was decided that an auctioneer was not an agent within the meaning of the statute; that he acted in an independent capacity, agreeing to sell the goods and return to the prosecutor a stipulated price; that he had a right to mix the proceeds of the sales with the proceeds of other sales and handle as his own; that there was no conversion of the specific property of the prosecutor, he having the right to sell it; that in making sales, he might take in bills larger than the price, and return change of his own money, and might deposit the money in bank in his own name, etc. See also *Commonwealth v. Libbey*, 11 Met. 64.

In looking for the basis of modern adjudications, we find in the old leading case of *Reg. v. Norman*, 1 C. & M. 501, that the court said that embezzlement necessarily involves secrecy and concealment. That if the defendant, instead of denying the appropriation, immediately owns it, alleging a right or an excuse, no matter how unfounded it may turn out to be, the case does not constitute embezzlement.

In *Rex v. Hodgson*, 3 C. & P. 422, defendant, who was a coach-office clerk, receiving hundreds of items of money per day for passengers and parcels, and whose duty it was to enter the same in a book, and remit weekly, failed to remit three payments; but his book showed he had accurately charged them up against himself. Vaughn, B., said: "This is no embezzlement; it is only a default of payment. If the

prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not a felony. It is but a matter of account."

See also note to above case, referring to *Rex v. Hebb*, where it appeared from the books of a clerk that he had received more money than he paid out, in which Garrow, B., held that this was not enough, and that it was necessary to prove that some distinct act of embezzlement had been committed.

In *Beaty v. State*, 82 Ind. on page 232, the court approved of the following instruction as correctly stating the law: "In such cases, an intent to feloniously appropriate the property, at the time of the appropriation, is essential; and if the appropriation is made upon the belief, honestly entertained by the accused, that he has lawful title or right to appropriate it, the act is not criminal."

PEOPLE v. McBRIDE.

120 Mich. 166—78 N. W. Rep. 1076.

Decided May 9, 1899.

EMBEZZLEMENT: Admissions by a copartner—Mistake in a draft.

1. Where a firm of lawyers had a note and mortgage for collection, and one of the members was on trial for embezzling the money collected thereon, it was held that the statements of his partner relating to such transactions, made more than a year after the alleged collection was made, were not a part of the *res gesta*, and were inadmissible.
2. Where a draft was drawn payable to another party by mistake, but the firm to which defendant belonged received the money, it being intended by the drawer that it should, and he ordering the drawee to pay it to that firm, *held*, that the draft was properly received in evidence.

Exceptions before sentence from the Grand Rapids Superior Court, Burlingame, Judge, by James E. McBride, who was therein convicted of embezzlement. Reversed.

David E. Burns (John O. Zabel, of counsel), for the appellant.

Horace M. Oren, Atty. Gen., and *Frank O. Rogers*, Prosecuting Attorney, for the People.

This is exceptions, before sentence, to review proceedings in which respondent was convicted of embezzlement. The testimony on the part of the People tended to show that in August,

1895, the respondent and his son, Edward G. McBride, were co-partners engaged in the practice of law at Grand Rapids; that one Frank Lewis during that month left with respondent a note and mortgage made by one Lyons, of Holland, Mich., for collection; that from time to time he made inquiries about the progress which was being made, and various reasons were assigned by Edward G. McBride why the money had not been received, until in July, 1897, he learned that the money on the mortgage had been paid in January, 1896, and the mortgage discharged; and that the discharge of the mortgage was not executed by him. The people called John A. Seymour, cashier of the Fourth National Bank of Grand Rapids, who testified that on the 22d of January, 1896, he paid to respondent a draft drawn on his bank by the cashier of the Holland City Bank, payable to the order of the Fuller & Fuller Company, and indorsed by McBride & McBride; that before paying the draft he called up the Holland City Bank for instructions to pay this sum to McBride & McBride. The cashier of the Holland City Bank was called, and testified that he drew the draft in question in payment of the money received on collection of the said note and mortgage received from McBride & McBride for collection, and by mistake made it payable to the Fuller & Fuller Company (having just previously drawn a draft in this name), and on the 22d of January, when Mr. Seymour called him up, he instructed him to pay the draft to McBride & McBride. The prosecution also showed a demand and refusal to pay it over to the complaining witness. The respondent denied having received the money on the draft, and showed that the indorsement of the firm name of McBride & McBride was not in the handwriting of either member of the firm, and gave evidence tending to show that the discharge was signed by the complaining witness. Respondent also gave testimony tending to show that on the 22d of January, 1896, he was not able to be at the Fourth National Bank, as he was confined to his house by illness.

GRANT, C. J. (after stating the facts). The first four assignments of error relate to the admission of statements of Edward G. McBride relative to the progress of the collection made from time to time, and the fifth relates to the admission in evidence of

a statement by him that the firm had received a draft, which, on due inspection, they found did not belong to them. The ruling on the last question was not excepted to, but the court, on making an earlier ruling, stated that all testimony of the statements of Edward G. McBride was taken subject to exception. The character of the testimony admitted against the objections and exceptions noted under the first four assignments may be illustrated by a question put to Albert Lewis, and the answer. The question was: "You may state what Ed. said to you in regard to this note and mortgage." The witness answered: "I went there several different times to see him about other matters, and incidentally he would talk about the Lyons mortgage. He said it was being foreclosed; and one time he said a copy of the foreclosure was being prepared by the printer, and would soon be through his hands, and we could have a copy of the paper. I asked him what paper it was being printed in, and he said he didn't remember, but would ascertain, and send us a copy. I think that was in April, 1897; can't say definitely." As the evidence showed that the mortgage had been discharged and delivered up to Lyons in 1896, it is apparent that this statement, if made by respondent, would be very damaging, as it is an attempt to temporize by an untruth. The very fact that this testimony was important suggests the necessity of care in determining its admissibility. It was mere hearsay, unless it be held that it was a part of the *res gestæ*, or that respondent's partner was so far his agent as to bind him by an admission, or, rather, to reflect upon him an untruthful equivocation. It was clearly not a part of the *res gestæ*. "The declarations of third parties are not admissible as part of the *res gestæ*, unless they in some way elucidate, or tend to give character to, the act which they accompany, or may claim a degree of credit from the act itself." Rose. Cr. Ev. (8th ed.) 41, note. See, also, *People v. Mead*, 50 Mich. 228, 15 N. W. Rep. 95. The case of *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. Rep. 199, cited by the counsel for the People, is clearly distinguishable from this. In that case it was held that the statement of a clerk in a bank as to whether a draft had been paid was admissible. This was on the ground that the statement was made in the course of his agency, and constituted a part of the *res gestæ*. It was a civil

case, and the statement was one of fact, by one of whom the witness was, by the course of dealing, expected to inquire. This statement, under these circumstances, would bind the firm, for the reason that he spoke for the firm. So, in the case of a partnership, each partner speaks for the firm, and binds all as to its civil obligations. This is on the ground that each partner is agent for all partnership business. It is quite another question, however, whether a copartner may make an admission which will bind his copartner in a criminal proceeding; and it is still a greater stretch of the authority of an agent to say that he may, by an untruthful account of what has gone on in the business of his principal, subject that principal to punishment as for a crime. See *Lambert v. People*, 6 Abb. N. C. 181. Wharton states the rule as follows: "When the relation of principal and agent is established in a particular transaction, the agent's admissions may be imputed to the principal, if his agency involves the making of such admissions." Whart. Cr. Ev., § 695. The illustrations given by the author consist of cases in which the statement of the agent was a part of the *res gestæ*. In 1 Rose. Cr. Ev. (8th ed.) 85, it is said: "An admission by an agent is never evidence in a criminal, as it is sometimes in civil cases, in the sense in which an admission by a party himself is evidence. An admission by a party himself is in all cases the best evidence that can be produced, and in all cases supersedes the necessity of further proof; and in civil cases the rule is carried still further, for the admission of an agent, made in the course of his employment, and in accordance with his duty, is binding upon the principal, as an admission made by himself. But this has never been extended to criminal cases." We think this testimony inadmissible under either of the rules stated. The statements of Edward G. McBride were made fifteen months after the commission of the alleged offense. The statement is not claimed to be a matter of fact, but quite the contrary,—an untruthful account of the state of the business, from which the jury would naturally infer an attempt to cover up an offense.

It is next contended that it was error to permit the draft drawn by the Holland City Bank, payable to the order of the Fuller & Fuller Company, to be admitted. It is said that the draft was either the property of the Fuller & Fuller Company,

or was a nullity; that is, it was dead paper in the hands of McBride & McBride. We think none of these objections are tenable. The testimony of the prosecution tended to show that this draft was in fact sent to McBride & McBride in payment for the Lyons mortgage, that by mistake it was made in the name of the Fuller & Fuller Company, that it was in fact presented for payment by respondent, and that its payment to him was authorized by the drawer, and that the amount of the draft was in fact paid to him. If the jury believed this testimony, it would show, beyond cavil, that the respondent received this money as the proceeds of this collection, and as the attorney of Lewis. It was entirely competent to trace the money into respondent's hands by the methods pursued. The same considerations answer the respondent's contention that the court should have directed an acquittal. The case was a proper one for the jury.

None of the other questions require discussion, as they are not likely to arise on a new trial.

For the errors pointed out, the conviction will be set aside, and a new trial ordered.

MONTGOMERY, HOOKER, and LONG, JJ., concurred; MOORE, J., did not sit.

NOTES ON EMBEZZLEMENT (by H. C. G.)—It is well to bear in mind the origin of the law of embezzlement and the distinctions between it and larceny, in order to properly analyze the principles of the various cases.

Larceny consisted in the felonious taking of property from the possession of the owner, and involved the element of trespass as well as of appropriation. Where there was no possessory right there was no larceny. Where the servant received property from a third party for the master, without its ever having been in his possession, and converted it, larceny did not lie. Thus, where a banker's clerk received money for his master and appropriated it, it was held no larceny, because the master had never been possessed of it. And where the master gave his servant a note to change, which he did, receiving other money for it, it was held no larceny; but if he had converted the original note, it would have been larceny, because he received it from the possession of the master, and the master's possession would have continued unbroken up to the conversion.

But one who was simply a custodian was guilty of larceny if he appropriated the property intrusted to him. So a carter was guilty of larceny who drove off his master's cart which had been intrusted to him, and also the drover who converted the animals in his care, be-

cause the possession of the master continued all the time, and the reasoning was that they took the property from the possession of the master.

In 2 Russell on Crimes, 382 (9th ed.), it was said that the "clear maxim" of the common law was "that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use."

It was to obviate and circumvent this *hiatus* in the owner's or master's necessary right that the statutes of embezzlement were enacted; it was the instance of legislative fiat to infuse into the master the right of possession to his property, the instant it came into the possession of his servant or agent.

Mr. Russell also says, in vol. 2, p. 412 (9th ed.), referring to the English statute: "If, therefore, a man pay a servant money for his master, the case will be within the statute, etc.," and further on he says: "and the effect of this clause is to make the *possession of the servant the possession of the master*, wherever any property comes into his possession within the terms of this clause, so as to make him guilty of embezzlement if he converts it to his own use."

Mr. Wharton says (sec. 1027, Wharton's Cr. L., 9th ed.), "If the case is larceny at common law, from the fact that the money was taken from the prosecutor's possession, the prosecution for embezzlement fails. It is scarcely necessary, in support of this position, to repeat the statement (from sec. 1009) that the embezzlement statutes were passed, not to touch any cases within the common-law range of larceny, but to cover new cases outside of that range. Hence that which is larceny at common law, from the fact that the goods were taken from the owner's possession, is not embezzlement."

In section 1009, referred to, speaking of the cases of servants taking the master's goods *before they have come into the master's possession*, and of trustees and bailees converting the master's goods *bona fide* received, he says: "Now, as neither of these cases is larceny at common law, the statutes of embezzlement in no way overlap the old domain of larceny. They were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence nothing that is larceny at common law is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes is larceny at common law. It is important to keep this in mind, as from missing this point some confusion in construing the embezzlement statutes has been produced."

In *Kibs v. People*, 81 Ill. 599 (601), 2 Am. Crim. Rep. 114, the Supreme Court of Illinois approved of the doctrine laid down in the foregoing section of Mr. Wharton, and made a literal quotation therefrom. In fact this distinction is inherent in the subject and is generally recognized. In Am. & Eng. Ency. 981 (2d ed.), it is said that "Embezzlement is generally regarded as a separate and distinct crime, and is so treated. Though there are decisions in some States to the contrary, it is held under most of the statutes that the two crimes do not overlap, but are separate and distinct, and that if the offense is one it

cannot be the other;" and in a note it is further laid down that "the weight of authority is clearly in favor of regarding embezzlement as a separate and distinct offense, and that this is undoubtedly the correct law in America," citing numerous authorities.

It is because these distinctions are fundamental and inherent that it becomes necessary for the pleader in drawing the indictment, in addition to the charges of common larceny, where he uses them, to also aver the essential facts constituting the embezzlement, viz: (1) that the defendant stood in some *fiduciary relation* to another, such as servant, agent, clerk, treasurer, etc.; (2) that *by virtue of such relation* he received for and on behalf of his employer, or principal, moneys or other specified thing of value; (3) and that he unlawfully converted the same, or a portion thereof, to his own use.

The using of the statutory words, that the defendant is "deemed guilty of larceny," or of "having stolen" the same, or that he "did steal" the property in question, etc., does not and should not do away with the necessity of pleading those essential facts of the offense. Otherwise the liberty of the citizen would depend upon a purely legal fiction.

To simply charge that the defendant feloniously, etc., took, carried away, and stole the property of another, where the real facts were that, in the course of his employment as an employee or agent, he *lawfully* collected certain moneys for his employer, and then, after a reasonable time in which to turn them over, or after demand upon him, he *unlawfully* kept and appropriated them, would constitute as baseless, and yet a far more pernicious and deadly fiction, than the antiquated ghostly spectre that haunts a declaration in trover, at whose venerable dictation the intelligent but reverential pleader meekly complains, that the plaintiff casually lost the chattels, and that the defendant found them, instead of alleging the real facts of detention and conversion.

In *Commonwealth v. Simpson*, 9 Met. 138, it was held that while the statute provided that the embezzler should be deemed to have committed larceny, yet embezzlement was distinct in its character from simple larceny; that a charge of simple larceny would not be sustained by proof of an embezzlement; that the indictment should allege sufficient matter to apprise the defendant that the charge was for embezzlement in its distinctive character.

Public officers—Public money—Legal authority; property must have a legal status in order to be the subject of embezzlement.—A statute punishing the embezzlement of public moneys by public officers applies only to officers having legal authority to receive and dispose of them.

A statute of Nebraska provided for certain fees to be paid to the auditor of the State by insurance companies. Subsequently the constitution was amended fixing salaries for executive officers, and prohibiting them from receiving any fees, all fees to be paid into the treasury.

The auditor was indicted for embezzling moneys of the State of Nebraska, to wit: certain fees from insurance companies, coming into his hands *by virtue of his office* as auditor. It was held that the constitu-

tional amendment abrogated those parts of the statutes in conflict with it, and that, in view of that amendment, the auditor did not receive any fees in the discharge of his duty nor by authority of law; that if he did receive any it was wholly outside of his official duty; that such fees were not received for the State; that the State did not and could not have any interest in them; and that as far as embezzlement was concerned, he did not and could not thus have embezzled the property of the State. That the court was asked to liberally construe the statute so as to effectuate its purposes, according to its spirit; but that meant to impair the meaning and spirit of the constitution, which was the fundamental law. *Moore v. State*, 53 Neb. 331 (1898), 74 N. W. Rep. 319.

A de facto officer may be guilty of embezzlement.—The treasurer of Nebraska was convicted of embezzling the State's funds, and one of the errors assigned was that his bond was not approved until six days after the statutory limitation, and therefore should not have been received in evidence, as he was not *de jure* the treasurer. It was held that the prosecution was not for the purpose of settling his right to the office, nor the validity of his acts; no person had ever raised any contest or question as to his right to exercise the functions of the office, so that that question was not directly in issue requiring a decision. That inasmuch as he had exercised all of the functions of the office for the full term without objection, it was not good policy to allow him, after the expiration of the term, when there was no question to be settled, to come in and impeach the legality of his occupancy of the office, when charged with malfeasance in office. That he was any way a *de facto* treasurer, and whether an officer *de jure* or *de facto*, he was bound to honestly perform the duties of the office he assumed. *Bartley v. State*, 53 Neb. 310, 73 N. W. Rep. 744 (1898).

Public officers, etc.—There must be a duty imposed and charged, and a felonious violation of that duty. A county tax collector was convicted of embezzling \$371. An instruction was, that if defendant wilfully omitted to pay over the same, etc., he was guilty. In a well considered opinion this was held to be error, not only because it was based on the wrong section of the statute, but also erroneous in principle. The court reasoned that there must be a duty, which should be charged; there must be somebody to pay over to; and there must be a wilful, fraudulent and felonious neglect and refusal to pay over. The mere omission to pay over the money was not in itself a crime, for the defendant might retain it as due him for commissions, or on other *bona fide* claim. It was the *wrongful* and *felonious* conversion that constituted the crime. *People v. Westlake*, 124 Cal. 452 (1899), 57 Pac. Rep. 465.

Radical error incurable.—The court held that while the rule is that a defective instruction may be cured by reading it in connection with other instructions that are correct, so as to make the whole harmonize, this does not apply to an instruction that is plainly erroneous in making a plain statement of an incorrect principle of law. *Id.*

Incompetent evidence.—The successor of the defendant said his attention had been called to a certain license book, at settlement, and

was asked if he had discovered anything unusual about the book, over objections. The court held that, while the answers were not clear, the evidence was improperly admitted, because it did not appear at what time such settlement was had, nor that the book had ever been in the possession of the defendant, nor where it had been kept, nor that it was in the same condition as when the witness received it; that it might have been in the hands of a dozen different persons after its purported leaving the defendant's hands. *Id.*

Losing saw logs received as taxes is not embezzlement of taxes.—A township treasurer was indicted for embezzling \$700 of taxes, which he was charged to have received. He offered to show that he had taken a large number of saw logs in lieu of taxes, and receipted the taxes as paid, but that the boom which held the logs went out, and the logs floated away; and he, becoming financially embarrassed, was unable to reimburse the township. This evidence was rejected. The Supreme Court said that it should have been admitted. The statute provided that it was only necessary to make a *prima facie* case—that the officer, having received money by virtue of his office, failed or refused to pay it over. The court, however, said that a *prima facie* case may be rebutted. The defendant was charged with a felony, and should have been allowed to explain his conduct. But could not the defendant show that the taxes were not *in fact* ever received? The saw logs were not taxes. He had no right to receive them. Receiving them did not discharge the taxes, which were still due; he could not bind the State by receiving them, and however culpable his acts may have been, under the statute, and under the state of facts proposed to have been shown, he was not guilty of having embezzled the taxes charged against him. Taxes can be paid only in money. To take notes or property for taxes, might endanger the existence of the government. *People v. Seeley*, 117 Mich. 263, 75 N. W. Rep. 609 (1898).

The assignment of an unmatured obligation is not the embezzlement of money.—The Supreme Court of Connecticut, in *State v. Hanley*, 70 Conn. 265, 39 Atl. Rep. 148 (1898), passed upon the question of whether the assignment of an order before maturity is embezzlement of the money called for in the order.

Defendant Hanley kept a saloon. Episcopo was interpreter and purchasing agent for Italian laborers, and owed Hanley \$167 for goods and wares received from the saloon. Abbott Bros. owed Episcopo \$230, and Episcopo drew an order on Abbott Bros. for the \$230, which they accepted on December 6th, *payable December 18th*. Episcopo immediately turned this order over to Hanley to collect, and, after paying himself the \$167, to pay two of his creditors \$24, and the balance return to him. Hanley, in his turn, assigned the order to Lowe, an attorney whom he owed, and at maturity Lowe collected the money from Abbott Bros. Hanley was charged with embezzling, as the agent of Episcopo, the sum of \$63, being the difference between the amount of the order and the sum which Episcopo owed him.

Defendant denied that there was an agreement of agency, and that he was an agent within the meaning of the statute, and claimed also that Episcopo had been paid the balance coming to him; but the ques-

tion on which the conviction was reversed was, whether the defendant "did receive and take into his possession" and fraudulently appropriate the money of Episcopo. The court held that until that order became due, Episcopo owned no money in the hands of Abbott Bros. or of the defendant. At the time defendant assigned the order to Lowe, Episcopo had no money in the hands of Abbott Bros., and consequently defendant could not have appropriated his money. Defendant was charged with embezzling \$63 in money, whereas this order was a chose in action, from which money might be realized in the future. The court said: "The apparent cause of the error lies in the assumption that before the accepted order was due, Episcopo owned 'moneys,' within the meaning of the statute, in the hands of Abbott Brothers; and that these moneys, while in the hands of Abbott Brothers, were in the possession of agent Hanley, and were the subject of embezzlement by him as 'moneys' under the statute."

It might be added, in illustration of the principle of this case, that the "acceptance" did not purport that the acceptors had the money of the drawer or of any other person, or a dollar of their own, in possession at that time, but that they *expected* to have money on the day of maturity from some source,—it might be from legacy, bequest or gift,—with which to pay the order. See *State v. Johnson*, 77 Minn. 267, reported in this volume.

Admissibility of evidence of contracts and transactions between the defendant agent and his employer was rather clearly discussed in the case of *Walker v. State*, 117 Ala. 42, 23 So. Rep. 149 (1898). Defendant was indicted for embezzling \$210 from the Singer Mfg. Co. He claimed that if credits were allowed him for old machines and other items, including office rent, he would not be indebted to the company; and offered to prove by the company's agent that he refused to renew the written contract between them unless the company would pay his office rent, which the agent promised should be done; also to prove similar promises to pay for repairs of wagons. The exclusion of this evidence was held to be error.

Also, it was held to be incompetent for an agent of the company to testify from a written statement of a purported settlement of accounts he had with defendant when such statement was not made in the presence of defendant, or at the time of settlement, but subsequently, from notes. But it was competent for the defendant to show to the company's agent, while testifying, a prior favorable written report to the company, and to ask him if he did not write the report.

In its opinion the court said:

The court erred in refusing to allow defendant to prove by the witness Walls (who represented the Singer Manufacturing Company in making with defendant the two written contracts of employment) that when the second contract was executed he (witness) stated to defendant that the company would pay defendant's office rent, as it had done theretofore, and that defendant refused to sign the second contract until he made that promise. The proceeding, of course, was not for the enforcement of the contract between the Singer Company and defendant. It was a public prosecution of a charge of embezzlement

made against the defendant by the grand jury, wherein the intent of the defendant, if he appropriated the moneys of his principal, as charged, was the most vital consideration. If the appropriation was not with the intent to defraud the employer, but was honestly made, to pay the office rent, in reliance upon the agent's statement sought to be proven, as the defendant claimed to have been the case as to a part of the funds received by him, it would be manifestly unjust to deny the defendant the right to make proof of the promise of the agent as going to show his intent in making the appropriation. The rule, that as between the parties to a written contract, its terms cannot be added to, altered, or varied by parol stipulations made at or before its execution, has no application to the case. That will apply when the contracting parties come to litigate their rights evidenced by the contract.

The same observations apply to the refusal to permit defendant to make the like proof by his own testimony, and also to his effort to prove similar promises by the agent Walls, in reference to payment by the company of repairs to the wagons used in the business of the agency.

It is obvious, however, that it was not proper for the State to prove by its witness—an agent of the Singer Co.—how much commissions the defendant was entitled to receive on collections. The written contracts regulated that, and were before the court, and there was no question of motive or intent, touching the issues involved in the prosecution, which that witness's views of what the allowable commissions were, would shed any light upon. It was not proposed to be shown even that when the written contracts were executed, or at any other time, there was any agreement between the parties that the commissions should be different from the stipulations of the written contracts, if such evidence should be regarded as material.

In the fall of 1895, the agent of the Singer Co. checked up the defendant's accounts, resulting very favorably to the defendant, and made his written report to the company accordingly. When this agent was on the stand for the State, testifying to the transactions of that period, the defendant, presenting to the witness the written report itself, asked him if he did not, after he got through checking the defendant, write the report to the company, and the court refused to allow the proof, which refusal is a matter of exception. It does not appear that this was for the purpose of impeachment of the witness, by contradictory statements. It was not for that purpose. So the only question is, was the report admissible as *res gestæ*? It sufficiently appears that it was the agent's duty and office to check up the defendant's accounts, and make written report thereof to the company. The defendant paid to the agent the balance ascertained to be due on that accounting.

We are of opinion the report was a matter of *res gestæ*, which the defendant was entitled to show. The settlement made was as between the parties even *prima facie* correct, and the defendant ought to have the benefit of it when charged with embezzlement of funds theretofore coming to his hands.

The ruling of the court was correct, to the effect that defendant was

not entitled to commissions on money not remitted to the company, or accounted for in a way that was equivalent to legal payment thereof to the company. If, however, commissions were retained by the defendant which strictly, by the contract, he was not entitled to retain, it will yet be for the jury to say whether or not, under all the circumstances of the case, the defendant acted with a fraudulent intent in doing so; for it must ever be borne in mind by the jury that, before the defendant can be adjudged guilty of a crime in this case, there must have been both a wrongful appropriation of money (not sewing machines or other property, *but money*) of the Singer Manufacturing Co., which came into defendant's hands as agent of the company, and a fraudulent intent in his mind, at the time of the appropriation, to deprive the employer—the company—of the money so appropriated, and the evidence must be such as to satisfy the minds of the jury of the fraudulent intent beyond a reasonable doubt; the burden of proof, in the matter, being on the State.

The court permitted the State to introduce an account marked Exhibit B, which its witness Forbes had, as agent of the Singer Company, made out against defendant, purporting to show sundry items of collections of money (thirty or more) which defendant had made as agent for the company, on sundry dates, running from December, 1894, to January 1896, aggregating \$271.05, with an opposite statement "selling and remitting commissions" amounting to \$55.62. The witness testified that in the spring of 1896 he called on defendant for a settlement, and that he and defendant, in the presence of Mr. Walls and Mr. McCumber (who were also agents of the company), went over the accounts between defendant and the company, and defendant admitted having collected and failed to pay over the amounts which are set out on said Exhibit B. He did not say, however, that Exhibit B was then in existence, or that defendant ever saw it at any time, or knew of its existence. In fact, the witness further testified that he made the memorandum B, not at the time defendant admitted the collection, etc., nor while he was present, but made it from notes, at his room at the hotel, about an hour afterwards. The bill of exceptions recites that the exhibit "was not admitted as evidence, but witness was permitted to examine it to refresh his recollection, and it might go to the jury the better to enable them to remember what witness said."

It is seen from the above statement that witness does not show that the memorandum was made up from notes taken by him on the examination of defendant's accounts had by him with the defendant. Probably such was the case, but it does not so appear. It could not be said, from his statement, when or from what data or evidence he made the notes from which the memorandum was made up. The notes may have been of the purest hearsay character, of the truth of which the witness had no knowledge, and possessing no binding force on the defendant. The witness did not testify to the truth of what the notes showed, nor how he knew it. Under these circumstances, we think it was not proper to permit the witness to refer to the memorandum to refresh his recollection."

COSGROVE v. WINNEY.

174 U. S. 64—19 Sup. Ct. Rep. 598, 43 L. Ed. 897.

Decided April 24, 1899.

EXTRADITION: Privilege from arrest during pendency of the proceeding.

A person who is brought into the United States upon a warrant granted in accordance with the extradition provisions of an international treaty is, while under arrest or on bail, by virtue of such proceeding, privileged from arrest for any prior matter; which privilege is not affected by his going back from whence he was extradited and again returning to the United States.

Appeal from the District Court of the United States for the Eastern District of Michigan.

On November 7, 1895, Winney, a United States marshal, upon complaint charging Cosgrove, a resident of Canada, with the larceny of a boat, caused a warrant to be issued by a police justice of the city of Detroit for his arrest. Proceedings were then had by which Cosgrove was brought from Canada upon an extradition warrant issued by the Canadian government, May 19, 1896; and by the police court of Detroit was bound over to the July term, 1896, of the recorder's court of that city. He gave bail and returned to Canada; but came back to Detroit in December, 1896. On December 3, 1895, a *capias* was issued by the district court of the United States for the eastern district of Michigan upon an indictment against Cosgrove, the charge being that he obstructed a United States marshal in the execution of a writ of attachment. This warrant was not served until several months after Cosgrove had been admitted to bail in the recorder's court of Detroit. When arrested upon this *capias*, Cosgrove sued out a writ of *habeas corpus* from the district court; but upon being remanded in custody, he appealed to the circuit court of appeals, where his appeal was dismissed; whereupon an appeal to the Supreme Court was allowed, and Cosgrove released on his own recognizance.

The district judge stated in his opinion that it appeared "that the property, for the taking of which he (Cosgrove) is charged with larceny, was the vessel which, under the indictment in this court, he was charged with having unlawfully taken from the custody of the United States marshal, while the same was held

under a writ of attachment issued from the district court in admiralty."

And also: "The only question which arises under this treaty, therefore, is whether upon the facts stated in the return, which was not traversed, the petitioner has had the opportunity secured him by that treaty to return to his own country. If he has had such opportunity, then article 3 has not been violated, either in its letter or spirit, by the arrest and detention of the petitioner. It is conceded that he was delivered to the authorities of the State of Michigan in May, 1896, to stand his trial upon the charge of larceny. He gave bail to appear for trial in the recorder's court when required, and immediately returned to Canada. On December 10, 1896, he voluntarily appeared in the State of Michigan, of his own motion, and not upon the order of the recorder's court, or at the instance of his bail, and while in this district was arrested."

Mr. E. H. Sellers and Mr. Cassius Hollenbeck, for appellant.
Mr. Solicitor General, for appellee.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Article three of the Extradition Convention between the United States and Great Britain, promulgated March 25, 1890 (26 Stat. 1508), and section 5275 of the Revised Statutes, are as follows:

"Article III. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

"Sec. 5275. Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial and for the crimes or offenses specified in the warrant of extradition, and until his

final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land and naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

Cosgrove was extradited under the treaty, and entitled to all the immunities accorded to a person so situated; and it is admitted that the offense for which he was indicted in the district court was committed prior to his extradition, and was not extraditable. But it is insisted that although he could not be extradited for one offense and tried for another, without being afforded the opportunity to return to Canada, yet as, after he had given bail, he did so return, his subsequent presence in the United States was voluntary and not enforced, and therefore he had lost the protection of the treaty and rendered himself subject to arrest on the *capias* and to trial in the district court for an offense other than that on which he was surrendered; and this although the prosecution in the State court was still pending and undetermined, and Cosgrove had not been released or discharged therefrom.

Conceding that, if Cosgrove had remained in the State of Michigan and within reach of his bail, he would have been exempt, the argument is that, as he did not continuously so remain, and, during his absence in Canada, his sureties could not have followed him there and compelled his return, if his appearance happened to be required according to the exigency of the bond, which the facts stated show that it was not, it follows that when he actually did come back to Michigan he had lost his exemption.

But we cannot concur in this view. The treaty and statute secured to Cosgrove a reasonable time to return to the country from which he was surrendered, after his discharge from custody or imprisonment for or on account of the offense for which he had been extradited, and at the time of this arrest he had not been so discharged by reason of acquittal; or conviction and compliance with sentence; or the termination of the State prosecution in any way. *United States v. Rauscher*, 119 U. S. 407, 433.

The mere fact that he went to Canada did not in itself put

an end to the prosecution or to the custody in which he was held by his bail, or even authorize the bail to be forfeited, and when he re-entered Michigan he was as much subject to the compulsion of his sureties as if he had not been absent.

In *Taylor v. Taintor*, 16 Wall. 366, 371, Mr. Justice Swayne, speaking for the court, said: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern, 231, it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee."

We think the conclusion cannot be maintained on this record that, because of Cosgrove's temporary absence, he had waived or lost an exemption which protected him while he was subject to the State authorities to answer for the offense for which he had been extradited.

The case is a peculiar one. The marshal initiated the prosecution in the State courts, and some weeks thereafter the indictment was found in the district court for the same act on which the charge in the State courts was based. The offenses, indeed, were different, and different penalties were attached to them. But it is immaterial that Cosgrove might have been liable to be prosecuted for both, as that is not the question here, which is whether he could be arrested on process from the district court before the prior proceeding had terminated and he had had opportunity to return to the country from which he had been

taken. Or, rather, whether the fact of his going to Canada pending the State proceedings deprived him of the immunity he possessed by reason of his extradition, so that he could not claim it though the jurisdiction of the State courts had not been exhausted; he had come back to Michigan; and he had had no opportunity to return to Canada after final discharge from the State prosecution.

We are of opinion that, under the circumstances, Cosgrove retained the right to have the offense for which he was extradited disposed of and then to depart in peace; and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained.

Final order reversed and cause remanded with a direction to discharge petitioner.

PEOPLE v. WEIR.

120 Cal. 279—52 Pac. Rep. 656.

Decided March 15, 1898.

FALSE PRETENSES: *Obtaining money from fiancée.*

Where a man obtained money from a young woman to whom he was engaged to be married upon specific false statements as to alleged facts, *held*, that the direct and moving cause that induced her to give her money was the false representations, and not the existence of the engagement to marry; that the latter only put her in a frame of mind to give credence to the former.

Appeal from the San Francisco Superior Court; Hon. William T. Wallace, Judge. Affirmed.

Ferral, Wilson & Terry, for appellant.

W. F. Fitzgerald, Atty. Gen., and *Charles H. Jackson*, for respondent.

GAROUTTE, J. The appellant has been convicted of the crime of obtaining money under false pretenses. The facts may be substantially stated in a few words. Appellant was engaged to be married to a young woman. He stated to her that he had the opportunity of securing employment with the real estate firm of Bovee, Toy & Co., and that as a condition precedent to such employment it was necessary for him to deposit with such firm one thousand dollars in money as security. He further stated

that he needed two hundred dollars to make up that amount, and asked her to advance it to him. She did so. His declaration as to the employment were false, and likewise his declarations as to the need of the one thousand dollars. After obtaining possession of the money the young woman no longer enjoyed his society, for she never saw him any more. The foregoing facts are a brief summary of the evidence in the part of the prosecution; at least it may be said that the jury, under the evidence introduced, was justified in declaring the existence of such a state of facts. And this state of facts is ample to support the verdict.

It is contended upon the part of the defendant that the woman loaned him the money because of the engagement existing between them, and not by reason of his representations to her as to the employment and necessity for a cash deposit. This point is extremely technical—indeed, so technical as to possess little merit. The fact that the prosecuting witness would not have advanced the money to a stranger upon the representations made, or even to a mere friend, furnish no light upon the issue. While the fact of the existence of the engagement was the remote cause of the loss of the money to the prosecuting witness, the direct moving cause was the false representations. The engagement simply acted as a leaven in placing her mind in that plastic condition in which it would most readily absorb the false representations made by defendant. Defendant also stated to the prosecuting witness that, if she would advance the two hundred dollars, "they then could be married right away." It is now insisted that such statement was the superinducing cause which actuated the girl's mind in parting with the money. Again, we deem this a technicality of small dimensions, and the suggestions already made meet the contention. Under any circumstances these questions were matters of fact for the jury to decide. We have examined the other matters discussed by counsel, and have arrived at the conclusion that there is no merit in the appeal.

Judgment and order affirmed.

VAN FLEET, J., and HARRISON, J., concurred.

Hearing in bank denied.

STATE v. RENICK.

33 Oreg. 584—56 Pac. Rep. 275.

Decided February 28, 1898.

FALSE PRETENSES: Cheating by a false token—Distinctions.

1. A man is not a *false token*; nor does he render himself one by assuming a fictitious name.
2. A woman giving money to a man under promise of marriage, who assumes a fictitious name and claims to be single while he has a wife living, does not part with her money by means of a false token.

Appeal from Multnomah County (Circuit Court).

George Renick, indicted for obtaining money by means of a false token, etc., demurred. Demurrer sustained, and the State appeals on a question of law. Ruling below affirmed.

C. M. Idleman, Atty. Gen., *Chas. F. Lord* and *R. E. Sewall*, for the State.

Stott, Boise & Stout, for the respondent. (Oral argument by *G. C. Stout*.)

WOLVERTON, C. J. The indictment in this case charges, in substance, that the defendant, George Renick, did on the tenth day of November, 1896, in Multnomah county, Oregon, wilfully and feloniously, with intent to defraud, by means of a certain false token, to wit, himself, the said George Renick, falsely and fraudulently present himself, the said George Renick, and represent and pretend to one Carrie Meyer, an unmarried woman, that he, the said George Renick, was one Charles Smith, that he was unmarried, and competent and in a position to lawfully contract marriage with her, whereas, in truth and in fact, the said George Renick was not Charles Smith, and was not then unmarried, but had a lawful wife then living; by means of which false token, fraudulent pretense, and false representations, coupled with a promise to marry her, the said Carrie Meyer, he, the said George Renick, did then and there obtain of Carrie Meyers divers gold coins, of the value of \$190. A demurrer to this indictment was sustained, and the State appeals. It is claimed that the money was obtained by false pretenses,

through and by the use of a false token, and that the use by defendant of himself as such false token was sufficient in law to constitute the offense. This presents the only question to be determined.

There was a species of cheat or fraud at common law which was effectuated through the use of deceitful or illegal symbols or tokens, such as were calculated to affect the public at large, and against which common prudence could not have guarded. It was not sufficient upon which to found the offense if a mere privy token was employed,—a counterfeit letter in another person's name, or a private check upon a bank in which the drawer had no funds (*Lara's Case*, 2 Leach, 647, 652), and the like,—not having the semblance of public authenticity or purporting to be of public consequence, such as spurious money of the realm or bank notes circulating throughout the community as a medium of exchange. But by St. 33 Hen. VIII., ch. 1, the obtaining goods by means of false privy tokens, counterfeit letters, etc., is expressly made an indictable offense, and this, Mr. Bishop says, has now become common law with us. 1 Bishop, Cr. Law, § 571. But as it regards privy tokens at least, this statute has always been considered as creating a new offense. *People v. Stone*, 9 Wend. 18. Another species of cheat or fraud at common law was accomplished through the false personation of another. 2 Russell, Crimes, 10, 11. Perhaps the commonly accepted definition of a "common-law cheat" is that "it is a fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in any pecuniary interest." 1 Bishop, Cr. Law, § 571; 2 Wharton, Cr. Law, § 1116; 5 Am. & Eng. Enc. Law (2d ed.), 1025. But Russell, in his work on Crimes, gives it a wider signification, and defines it as "the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public." 2 Russell, Crimes, 613. See, also, 1 Bouvier, Law Dict. p. 317. Under this definition, the cheat need not necessarily be accomplished through the use of a symbol or token, and cases are cited by the learned author, in connection with the definition, which would seem to support his enlarged conception of it. Some cases are cited by Bishop, as *Rex v. Jones*, 1 Leach, 174, wherein

an apprentice got himself enlisted as a soldier, and thus obtained a bounty, by professing that there was no impediment; and *Rex v. Hanson*, Sayer, 229, wherein a woman was indicted for getting board and lodging by falsely affirming herself to be single and of the name of Fuller, when she was married and of the name of Hanson. And it is supposed by the author that the boy in the one case and the woman in the other were tokens, and therefore that those cases were disposed of upon that ground only. But, when they are looked into, it does not appear that the decisions were based upon that theory. Indeed, they are so meagerly reported that it is difficult to determine what was the specific ground of their disposal. The broader definition of Russell and Bouvier of a "cheat" at common law would undoubtedly include the offense, as it was in either instance a deceitful practice. In the case of the boy, it was a wilful misrepresentation touching his age and apprenticeship; and of the woman, a wrongful personation of another.

There is an old case of *Reg. v. Macarty*, 6 Mod. 301, wherein it was charged that Macarty, one of the defendants, falsely represented himself to be a broker, and Fordenborough, the other of such defendants falsely pretended to be a merchant, of London, and as such traded in Portugal wines, and that, through such pretensions and representations, they induced one Chown to barter a quantity of hats for a quantity of a spurious and unwholesome wine, represented to be good and wholesome Portugal wine. In deciding the case upon exceptions to the indictment, Holt, C. J., says: "The crime is not the selling one thing for another, but here is a false token, the one pretending to be a broker and the other a merchant, and a combination to cheat." *Rex v. Govers*, Sayer, 206, is another old case wherein the defendant was indicted for falsely assuming to be a merchant, and producing divers counterfeit commissions purporting to be from Spain, and thereby induced another person to extend him credit. Upon a rule to show cause why judgment should not be arrested, Ryder, C. J., said: "The present case is much stronger than that of *Reg. v. Macarty*, inasmuch as the defendant, besides pretending to be a merchant, did produce several paper writings, which he affirmed to be letters containing commissions to him as merchant." Mr. Russell pertinently remarks, of the first of

these cases, that the true ground of the judgment was that it was a case of conspiracy, and this was another species of cheat at common law; and of the second, that the cheat was effected by means of a forgery, which was in itself a substantive offense, indictable at common law. The forgery, if successful, was indictable as a common-law cheat. The broader definition alluded to would include these offenses also, without going to the extent of holding that the defendants themselves were tokens.

But, whatever may be the rule and definition touching the common-law cheat, the statutes of England early began to distinguish between the different species of cheat, and to carve out a distinct offense for obtaining money or property by falsely personating another. Such an offense has been widely adopted in the American States, and our own statute has made the act punishable. Hill's Ann. Laws, § 1776. The statute has also made it an offense for any person to obtain, or attempt to obtain, with intent to defraud, any money or property whatever, by any false pretense, or by any privy or false token. Hill's Ann. Laws, § 1777. The evidentiary matter necessary to support a charge under the latter section must consist of a false token or writing accompanying the pretense. Hill's Ann. Laws, § 1372. Construing the two sections together, the crime known to our statute is much the same as that constituted by 33 Hen. VIII., which extended the common-law cheat so as to include one accomplished through the use of a false privy token or counterfeit letter. The two offenses are defined, however, and made separate and distinct, by statute, so that there need be no longer a question, as under the common law, as to whether, in the false personation of another, the person engaging in the deceit is himself a false token. It is made a crime to so act, and a case coming fairly within the statute, it is thought, could not be prosecuted under the section for obtaining money under false pretenses. The case at bar, however, is probably not a false personation, by reason of the fact that the defendant did not assume to represent a real personage, but only made use of a fictitious name, having no application to any one.

But it is contended that he is guilty of a false pretense by the use of himself as a token. If that were so, he must be regarded as a privy token, as his personation was not calculated,

nor was it his purpose, to deceive or impose upon the public in general; the fraud being an imposition upon an individual only, and not extending to the injury of the public, in the sense of a public cheat. In the *Jones Case*, 1 Leach, 174, the personation was of a class capable of enlistment in the public service, and the act operated as a fraud in the procurement of public moneys. So, in *Rex v. Hanson*, Sayer, 229, the woman obtained general credit by pretending to be unmarried, thus affecting the public. Mr. Wharton puts a case: "If a pretender (e. g., Perkin Warbeck or the Tichborne claimant) palm himself off on a community as another person, and, under the guise of his assumed character, obtain credit from the public at large, he is indictable as a cheat, assuming that he imposes upon persons who have no notice that his claims are disputed, and also addresses his imposture to the public at large. The offense is aimed at the public generally, and is, supposing there is no notice to put the others on their guard, aimed as much at the careful as the careless. Hence it is a cheat at common law." "But suppose," says the learned author, a little further on, "the pretender goes simply to an individual, and with that individual uses his pretended character as a basis for getting money, while there is nothing about the pretender's appearance or general reputation to sustain such character. In such case, there being no latency, since there is a direct subject tendered to the prosecutor on which to make inquiry, and the fraud being pointed at a single individual, it is not a cheat at common law." 2 Wharton, Cr. Law, § 1124. Thus it characterized the distinguishing feature between a token of public import and a privy token or symbol, and the effect of their use in the consummation of the common-law cheat, and it serves as an admirable aid in determining the nature of the supposed token used in the consummation of the offense charged. If, therefore, in the case at bar, the supposed token is a token at all, it should be termed a privy token.

But is the defendant himself even so much as a privy token? Within St. 33 Hen. VIII., such a token was taken to denote "a false mark or sign, forged object, counterfeit letter, key ring, etc., used to deceive persons, and thereby fraudulently get possession of property." Black, Law Dict. See, also, note to *Commonwealth v. Speer*, 2 Va. Cas. 67. Mere words are neither

symbols nor tokens. Hence it has been held that one who obtains a credit by falsely representing himself to be in trade, and keeping a grocery, utters a mere falsehood. *Commonwealth v. Warren*, 6 Mass. 72. So, if one falsely pretends to another that he has been sent by a third person for money, and obtains it (*Reg. v. Grantham*, 11 Mod. 222); or, in selling a horse he knows to be blind, wilfully represents him to be sound (*State v. Delyon*, 1 Bay, 353); or if he knowingly disposes of wrought gold under the sterling alloy for gold of standard weight (*Reg. v. Bower*, 1 Cowp. 323). In these and like cases the defendant but utters a naked falsehood, unconfirmed by symbol or token, and was not within St. 33 Hen. VIII. In the case of *Commonwealth v. Warren*, *supra*, the defendant represented his name to be William Waterman, and that he lived in Salem; and the court said respecting it that, "if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he may pursue a civil remedy for the injury, but he cannot prosecute by indictment."

Now, were the representations which the defendant made to the prosecutrix more than wicked falsehoods, under our statute? or may it be affirmed that his presence when uttering the falsehoods was the exhibition of a false privy token, which induced her to part with her money and assisted him in consummating the fraud? It was a matter susceptible of proof and demonstration, upon inquiry, for she was not bound to take his word touching his assertions that he was an unmarried man or that his name was Smith. His physical presence had no tendency to establish the one fact or the other, and was therefore not an agent, in the sense of a token or symbol, in consummating the deception and accomplishing the fraud. He may have been both a liar, and the symbol of a liar, but he himself, considered as a token, did not contribute, by reason of his personal appearance, to the deception. By the statutes of England and many States of the Union, the element of a false token or symbol is eliminated, and the law is broadly cast that whoever, by any false pretense, obtains money, etc., with intent to defraud, shall be guilty of the offense. The case of *Reg. v. Jennison*, 9 Cox, Cr. Cas. 158, is cited, wherein it appears that the defendant was indicted for having obtained money from an unmarried woman

on the false representation that he was a single man, that he would furnish a house with the money, and would then marry her, and it was held that the false representation that he was not a married man was sufficient to support a conviction for false pretenses. But the authority is not in point, as the decision was made under the enlarged English statutes, and the question of a token did not enter into the controversy. Under our statute, the pretense must be accompanied with a false token, and the question presented here is whether defendant was himself a false privy token. We think he was not. He did not attempt to dissimilate anything in existence. There are no personal or physical characteristics known to social science whereby an unmarried man may be distinguished from one that is married. So that if a man presents his physical self to another person, and says nothing of his marital state, no one can say whether he at that instant is married or single, from the inspection alone. Testimony must be produced *dehors* the person from which to determine the fact. If he says that his name is Charles Smith, a fictitious character, and that he was unmarried, when he had a wife living, this is a mere *descriptio personæ*, and an inspection of the person will neither corroborate nor detract from the statement. If he be denominated a "token," and that token is false, it is only made so by the lie he has uttered; his physical existence does not help to establish it. In other words, he has not assimilated anything of real existence whereby the unwary have been deceived. He did utter a wicked falsehood, and this is a false pretense, but the false token is wanting, and therefore the indictment does not charge a crime. It is necessary to specify the false token in the indictment (2 Wharton, Cr. Law, § 1129), and this the State has not done. The judgment of the court below will therefore be affirmed.

NOTE (by H. C. G.).—The distinction between the foregoing cases of *Weir* and *Renick* seems to be that, while in the former the question was simply one of straight false pretenses as to alleged existing facts, viz., that the defendant had secured a responsible position and needed the money to enter upon its duties, and thus the sooner marry the prosecuting witness, which was false, she relying upon such statements, in the latter case it was a question of a *false token*, it being charged that the prosecutrix was deceived by a false token and that the defendant himself was the false token. The idea of the prosecu-

tion was that, by giving himself a fictitious name, he became a fictitious and spurious individual—a *bogus* man, like a bogus coin or bogus instrument. This was a delusion, because his identity was not thereby changed; he still retained the same personality, and was nevertheless the *identical, genuine* Mr. Renick that the prosecutrix knew and treated with, and would have recognized, though he had a hundred *aliases*. In prosecuting him she did not intend to prosecute a fictitious personage, nor a fictitious name, but the actual person she knew. If she was deceived by coming into contact with defendant personally, it was by the actual, real Renick, and not by a false symbol, token, image or shadow of him. The theory of the prosecution was antagonistic to its aims, for how could judgment be executed upon a bogus, counterfeit or mythical Renick?

STATE V. WHIDBEE.

124 N. C. 796—32 S. E. Rep. 318.

FALSE PRETENSES: *Future contingencies.*

False pretenses, to be criminal, must be based on existing facts. A pledge to pay for goods bought, out of the proceeds of a check expected to be drawn in favor of the purchaser in the future, does not come within the statute.

J. B. Whidbee, indicted for false pretenses in the Daro County Superior Court; Hoke, Judge. Indictment quashed, from which ruling the State solicitor appealed. Ruling affirmed.

FAIRCLOTH, C. J. The defendant stands indicted for obtaining goods under a false pretense. On July 12, 1897, the defendant certified in writing that he had received of Fulcher "Twenty-four dollars in merchandise, the amount of my check for the quarter ending October 30, 1897, which check I hereby pledge in payment of same." He failed to apply said check or the proceeds thereof according to agreement. The defendant moved to quash the indictment on the ground that it stated no indictable offense, which motion was allowed, and the State solicitor appealed.

There was no error. The offense charged does not fall within the meaning of the Code, section 1027. The fact that the defendant did not have, and *could not have*, the check for the quar-

ter beginning August 1st to October 30th, was plain on the face of the writing, and was, or ought to have been, known to the prosecutor; and, whatever the motive was, it was not a fraudulent representation. Suppose the defendant had certified on July 12th that he would represent the firm of A. & Co. of New York during the same quarter; there would be no false statement of an existing fact, and the prosecutor would see and know it. Affirmed.

THORPE v. STATE.

40 Tex. Crim. Rep. 346—50 S. W. Rep. 383.

Decided March 27, 1899.

FALSE PRETENSES AND SWINDLING: MISCONDUCT OF JURORS: *Non-reliance on the false pretenses.*

1. On every charge of swindling, it must be alleged and proved that the complainant was induced to part with his money by the false pretenses; otherwise no offense is shown.
2. Where the complainant let defendant have money and took his check, telling him at the time that he did not believe he had a cent in the bank, but that he would give him \$5 to catch him and prosecute him, *held*, that the complainant did not rely upon the representations, and that no offense was shown.
3. It is ground for reversal that jurors, during their deliberations, discussed the failure of defendant to testify and explain the charge against him; and especially so in this case, where they convicted the defendant against the evidence of the prosecuting witness that he did not rely upon defendant's statements.

Appeal by R. H. Thorpe from a conviction for swindling, in the Grayson County Court; Hon. J. D. Woods, Judge. Reversed.

Mary & Vowell, for appellant.

Robt. A. John, Asst. Atty.-Gen., for the State.

BROOKS, J. Appellant was convicted of swindling of property under the value of \$50, and his punishment assessed at confinement in the county jail for ten days, and a fine of \$5, and he appeals.

Appellant's first two grounds of his motion for new trial are: (1) Because the court erred in failing to give his special charge to the effect that the evidence was not sufficient to sustain the charge, and instructing the jury to find defendant not guilty; (2) because the evidence is wholly insufficient to sustain the verdict of the jury.

R. L. McAfee testified for the State, in substance: "About February 4, 1899, in Grayson county, defendant came to me, and asked me to lend him \$5. He then owed me \$5; and I said to him, 'You owe me \$5 already.' He said, 'Let me have \$5 more, and I will give you a check for \$10.' I said to him, 'I think you are a short horse, and I don't believe you have a cent in the bank.' Defendant said: 'Mr. McAfee, you ought not to talk to me that way. If I did not have the money I would not say so.' I then said: 'Well, all right; if you tell me you have the money in bank, I will let you have \$5, if you will give me a check for \$10.' I gave him the \$5, and said, 'Now, Thorpe, I have given you this \$5, but I don't believe you have a cent in the bank, but I will give you that much to catch you, and, if you haven't this money in the bank, I will catch you and prosecute you.' I wrote the check, and defendant signed it, and I gave him the \$5." The only other evidence introduced was that of the witness F. A. Batsell, who testified that he was the teller of the Merchants' & Planters' National Bank, on whom appellant drew the check, and that, at the time appellant gave the check to McAfee, he did not have then, and has never had, any money on deposit in said bank.

The court, in his charge to the jury, very clearly and succinctly lays down the necessary things to constitute swindling: "(1) The intent to defraud; (2) an actual act of fraud committed; (3) false pretenses; and (4) the fraud must be committed or accomplished by means of the false pretenses made use of for the purpose,—that is, they must be the cause which induced the owner to part with his property. An essential element of the offense of swindling is that the party injured must have relied upon, believed as true, and been deceived by, the fraudulent representations or devices of the party accused." Applying this definition to the facts above stated, candor forces us to say that the evidence does not make out a case of swin-

dling, since the evidence fails wholly to show that the prosecuting witness believed or relied upon the statements of appellant that he had money in the Merchants' & Planters' National Bank, and the prosecuting witness explicitly told appellant that he did not believe he had a cent in the bank; that he (witness) would give appellant \$5 to catch him, and, if appellant had no money in the bank, witness would catch him and prosecute him. If the prosecuting witness had relied upon the statements of appellant that he had money in the bank, we cannot see why he should have made the threat against appellant indicated by the evidence; and when he expressly states that he did not believe appellant, and did not believe that appellant had the money, surely this statement precludes the idea that the prosecuting witness was induced to part with his money by the false representations of the appellant. The indictment must allege, in every case of swindling, and the evidence must show, that the injured party was induced to part with his property by means of the false pretenses; otherwise, it is not swindling. We do not think the evidence supports the conviction. See *Buckalew v. State*, 11 Tex. Crim. App. 352; *Mathena v. State*, 15 Tex. Crim. App. 473; *Moore v. State*, 20 Tex. Crim. App. 233; *Blum v. State*, id. 578.

Appellant's third ground of his motion for new trial complains of the misconduct of the jury in discussing the defendant's failure to testify. In support of this contention, appellant attached to his motion several affidavits. That of Henry Strong, one of the jurors, is, in substance, as follows: "That while the jury was deliberating and discussing the case, before they had reached a verdict, the fact that defendant did not testify was mentioned and discussed by several members of the jury. Affiant cannot give the names of the jurors who so mentioned the matter, but says the following, in substance, was stated by one or more members of the jury, to wit: That defendant had the privilege of testifying in his own behalf, and, if he had any explanation of the transaction in which he gave the check, he ought to have taken the witness stand and testified. To this some other juror replied that his counsel was too sharp for that. And this affiant then said that it was not proper for the jury to discuss the failure of defendant to testify, and that

it would invalidate the verdict. To which one of the jurors replied that he did not believe it, and, after this occurred, the fact of defendant's failure to testify was further mentioned and discussed." The affidavit of W. A. James is also attached, in substance: "That after the jury had considered the case for awhile, and failed to agree on a verdict, some members of the jury said, in substance, that defendant had the privilege of testifying in his own behalf, if he had desired to explain about giving the check; that, when this matter was mentioned, some of the other members of the jury said that the jury had no right to discuss defendant's failure to testify, whereupon some other members of the jury took the position that the jury did have the right to discuss defendant's failure to testify." The State filed the affidavit of W. C. Eads, W. A. James, G. W. Burke, J. F. Smith, Henry Strong, and G. W. Stubblefield, for the purpose of controverting the affidavits filed by appellant, in effect as follows: "The question of whether the jury had a right to discuss the defendant's failure to testify was mentioned and discussed by W. C. Eads and Henry Strong. Mr. Eads took the position that the jury had a right to discuss the fact of defendant not testifying, and Mr. Strong taking the position that the jury had no such right. This is about all that was said, except some one of the jury remarked that defendant could have told something. The substance of the statement was that he had the privilege of telling that, if he wanted to. Before, however, there was a word mentioned about the jury having the right to discuss the matter, the jury had taken a vote on the question of defendant's guilt, and the jury stood five for conviction and one for acquittal; the one standing for acquittal being Henry Strong, who said that the jury had no right to discuss the question of defendant's failure to testify. The discussion of this matter, nor anything mentioned in connection with defendant's failure to testify, nor anything said in reference to the jury having the right to discuss the question of defendant's failure to testify, had any influence upon our verdict, nor any upon our opinion in the matter whatever; but we arrived at our opinion of the defendant's guilt, and at our verdict, without being influenced a particle by any statement or remark whatever in regard to de-

fendant's failure to testify, or the jury having the right to discuss it." On the hearing of the motion, the juror Henry Strong was introduced, and testified, in substance, as stated in his first affidavit, save and except he states that, when he signed the affidavit for the State, he told Mr. Hare, the prosecuting attorney, that the affidavit he signed for defendant was correct, and called his attention to some points of difference between the affidavit signed for the State and the first affidavit he made for the defendant. The juror W. C. Eads, in the affidavit made subsequent to the one wherein he joins the other jurors, makes this statement: "That the question of whether the jury had a right to discuss the failure of the defendant to testify came up, and was talked about. Some took the position that the jury had such right, and others that they did not." We have repeatedly held that the fact that the prosecuting attorney comments on or alludes to the fact of the defendant's failure to testify would operate a reversal of the case. Article 770 of the Code of Criminal Procedure reads: "Any defendant in a criminal case shall be permitted to testify in his own behalf therein; but the failure of any defendant to so testify shall not be taken as a circumstance against him; nor shall the same be alluded to or commented upon by the counsel in the case." We think this statute means what it says, and where a jury, as in this case, comments upon the fact, and alludes to the fact that appellant did not testify, we think they have violated the letter and spirit of this statute. In this case we think the jury used the fact of the defendant's failure to testify as a strong and potent circumstance against him. This fact is made more apparent to our minds by recalling the further fact that the prosecuting witness had explicitly stated that he was not deceived by appellant's false statement, and yet the jury commented upon and alluded to the fact of his failure to testify; and we have the spectacle of one juror proposing to bet another that it was wrong to allude to the fact of appellant not testifying. It is furthermore developed by this record that the jury had not agreed upon a verdict, but stood five to one, at the time this discussion commenced, and subsequently they agreed upon a verdict. We think the misconduct of the jury in the matter complained of

entitled appellant to a new trial in the court below. *Wilson v. State*, 39 Tex. Crim. Rep. 365; *Tate v. State*, 38 Tex. Crim. Rep. 261. For the errors discussed, the judgment is reversed and the cause remanded. Reversed and remanded.

DAVIDSON, Presiding Judge, absent.

STATE V. JOHNSON ET AL.

77 Minn. 267—79 N. W. Rep. 968.

Decided July 12, 1899.

FALSE PRETENSES: *Intent—Larceny—Fundless check—Overdraft—Implied authority.*

1. In giving a check or draft one does not necessarily represent that the funds are *then* on deposit with which to meet it, but represents that the order is valid, and that in the ordinary course of business, under existing circumstances, it will be paid when presented.
2. Where officers of a corporation drew its checks upon a certain bank for five years, and for a year its account was overdrawn "off and on," and finally, to cover a shortage of \$4,600, gave its note for \$5,000 and collateral security, and the bank continued to pay its checks, and it continued to make deposits, somewhat reducing the shortage, and the officers drew the check for \$150 for which they were indicted, and the bank, between the drawing and presenting of that check (three days), had paid about a dozen of its other checks, it was held that no intent to defraud was shown, and that the corporation was impliedly authorized to draw upon the bank.

John S. Lord, president, and Charles F. Johnson, secretary and treasurer of the Lord Milling Co., tried in the Le Sueur County District Court; Cadwell, Judge.

Johnson was convicted and appeals. Reversed.

A. A. Stone and Smith & Parsons, for the appellant.

W. B. Douglas, Atty. Gen., and C. W. Somerby, Asst. Atty. Gen., for the State.

START, C. J. The defendant was convicted of the crime of grand larceny in the second degree in the district court of the

county of Le Sueur, and appealed from an order denying his motion for a new trial. The indictment is based upon G. S. 1894, § 6711, which is in these words:

"A person who wilfully, with intent to defraud, by color or aid of a check or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same, and punishable accordingly."

The gist of the offense defined by this statute is the obtaining, with intent to defraud, the money or property of another by false pretenses; that is, by color or aid of a check or draft which the accused has no reason to believe will be paid. In negotiating a check the maker does not necessarily represent that he then had with the bank funds out of which it will be paid, but he does represent by the act of passing the check that it is a good and valid order for its amount, and that the existing state of facts is such that in the ordinary course of business it will be met; or, in other words, he impliedly represents that he has authority to draw the check, and that it will be paid on presentation. Such authority need not be expressed, but it may be inferred from the course of dealing between drawer and drawee. 7 Am. & Eng. Enc. 738; *Queen v. Hazelton*, L. R. 2 Crown Cas. 134; *Commonwealth v. Drew*, 19 Pick. 179; *Barton v. People*, 35 Ill. App. 573. Therefore if the defendant in this case, when he negotiated the check here in question, had good reason to believe, and honestly did believe, that he had authority to draw it, and that the then existing state of facts was such that the check would be paid in the ordinary course of business, he is not guilty of obtaining money by false pretenses, although the check was not in fact paid for want of funds. If such be this case, the intent to defraud, the gist of the alleged offense, would be wanting. On the other hand, if he did not have any reasonable cause for believing that he was entitled to draw the check, and that it would be paid, the jury would be justified in inferring from such a state of facts that he intended

to defraud by color or aid of the check, and he was rightly convicted.

The important question, then, in this case, and the only one we deem it necessary to consider, is whether the evidence is sufficient to sustain the verdict of guilty.

The evidence on the part of the State was to the effect following: The Lord Milling Company, a corporation, and herein-after designated as the "corporation," had been engaged in the business of buying wheat and manufacturing it into flour at Elysian, in Le Sueur county, for more than five years next before July 28, 1898. John S. Lord was its president, and the defendant Charles F. Johnson was its secretary and treasurer. It did its banking business during this time with the Bank of Waterville, located at Waterville, this State, seven miles distant from Elysian. When the corporation needed money for immediate use in purchasing wheat for its mill, it was accustomed to draw its check on the Bank of Waterville, payable to J. S. Morton & Co., doing a banking business at Elysian, and get the cash on it. The account of the corporation with the bank was overdrawn "off and on" for a year before the making of the check here in question, but its checks were always paid by the bank. This overdraft amounted on June 15, 1898, to \$4,600, and on that day the cashier of the bank wrote to the corporation, stating the amount thereof, and requesting that it be adjusted. Thereupon and on the next day Lord and Johnson went to the bank, and gave to it the note of the corporation for \$5,000, dated on June 16, 1898, payable, with interest, in forty-five days after date, and secured its payment by a pledge of the stock of the corporation. The cashier testified that this note was taken, not in payment of the overdraft, but as collateral security for its payment. Nothing was said at this or any other time with reference to a discontinuance of the practice of making overdrafts by the corporation. On the contrary, the bank continued to pay all the checks of the corporation to July 23, 1898, inclusive. The cashier's testimony on this point is this:

"Q. Was there anything said at that time with regard to their payment of the note or the payment of the overdraft? A. There was as to the payment of the overdraft. Q. And what was said? A. I said to them that I didn't want them to con-

sider they had forty-five days' time on that note or on the overdraft. I wanted them to reduce the overdraft at once. Q. And they did, didn't they? A. Yes. Q. And between June 16, 1898, and July 20, 1898, they had reduced it from \$4,606.71 to \$3,569.88, or more than \$1,000, hadn't they? A. Yes, sir. Q. How had they reduced that? A. Well, by remittance. They had made more remittances, but they were drawing out at the same time. Q. Well, now you paid all of their checks,—you honored and paid all of the checks drawn on your bank by the Lord Milling Company from June 16, 1898, to July 1, 1898, didn't you? A. Yes, sir. Q. And you also honored and paid all of the checks drawn on you and presented at your bank between July 1, 1898, and July 23, 1898, didn't you, inclusive? A. Yes, sir."

The defendant Johnson, on July 20, 1898, in the usual course of the business of the corporation, drew its check for \$150 on the Bank of Waterville, payable to J. S. Morton & Co., who cashed the check, and the money was used in the business of the corporation. This check was presented to the bank for payment July 25, 1898, and payment refused, and on July 28, 1898, the bank commenced suit against the corporation and attached its property. This was the first refusal of the bank to pay the checks of the corporation, and there was no previous communication between them as to the overdraft, except that the cashier sent to the corporation its usual monthly statement on July 1, which showed that the \$5,000 note had not been credited on the account, and that there was an overdraft. Two days subsequent to the making of this check the bank cashed eleven checks of the corporation, aggregating \$730, and on the third day thereafter it paid a further check of the corporation amounting to \$176, and two days after the making of such check the corporation deposited \$608 on account with the bank, and between June 16, the time of the making of the note, and July 25, the corporation paid into the bank on its overdraft or note some \$1,600. There was only slight, if any, evidence that the corporation was insolvent in fact at the time the check was made. So much for the evidence on the part of the State.

The case was dismissed as to Lord, on motion of the prosecution, at the close of the evidence for the State. Both Lord and

the defendant testified that their understanding was that the \$5,000 note paid the overdraft, and that it was given for some \$400 more than the overdraft, so that they would have enough to their credit to pay their checks until they made further deposits; that the cashier first wrote a note for the exact amount of the overdraft, but, on the suggestion of the defendant and for the purpose stated, the cashier prepared a new note for \$5,000, which was executed on behalf of the corporation. This evidence as to changing the amount of the note and the reason therefor was not contradicted by the cashier, nor did he offer any explanation why the change was made, or why the note was finally made for \$400 more than the overdraft, if it was taken simply as collateral thereto. The defendant also testified that, at the time he made the check and received the money thereon for the corporation, he believed that he had a right to do so, and that the corporation had funds in the bank to meet it. It is not clear on the face of the record that the preponderance of evidence, on the question whether the note was given to adjust the overdraft, is not in favor of the defendant. But, assuming, as we must, for the purpose of this appeal, that the cashier's testimony on this question is entirely correct, and that there was an overdraft at all times after the note was given, still the undisputed evidence is well-nigh conclusive that the defendant had good reason to believe, and did honestly believe, at the time he made the check in question, that he was entitled to draw it, and that he had no intention of defrauding any one by the check or otherwise.

We are in full sympathy with the suggestions of the attorney-general that business interests must not be jeopardized with impunity by dead beats and kilters drawing and circulating worthless checks, but such is not this case. The evidence so absolutely fails to show that the defendant made the check and received the money thereon, with intent to defraud, that we should be false to our duty if we failed to set the verdict of guilty aside. It is clear from the course of business between the bank and the corporation that the latter was impliedly authorized to make overdrafts, and that the authority was not revoked until after the check in question was made. The most that can be claimed from the evidence is that the corporation was to draw

no more checks on the bank, unless the overdraft was reduced. This condition was complied with, and the bank continued without objection to pay the checks of the corporation after the giving of the note, as it had done before. Two days after the check in question was made and negotiated, the bank paid eleven checks of the corporation aggregating \$730, and three days thereafter another for \$176; and the corporation, two days after the check was drawn, deposited with the bank an amount four times greater than the amount of the check. These facts are radically inconsistent with the claim that the defendant intended to defraud J. S. Morton & Co. or any one else when he negotiated the check of the corporation for its use and benefit.

The verdict is clearly unsupported by the evidence, and it is set aside, and a new trial granted.

NOTES (by H. C. G.).—*The pretenses must be not only false, but fraudulent.*—In *Rex v. Williams*, 7 C. & P. 354, Coleridge, J., in summing up said: "Although, *prima facie*, every one must be taken to have intended the natural consequences of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud Peter Williams, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud Peter Williams." Not guilty.

In *People v. Thomas*, 3 Hill (N. Y.), 169, Jones gave to Thomas his note due one day after date. Several weeks later Thomas called on Jones for payment, telling him that the note had been burned or lost, which was untrue, and Jones paid the note. Subsequently it was claimed Thomas sold the note. It was held that the pretense was not felonious; that there was no intent at the time to defraud Jones, who merely did his duty in paying the note, and that it was no crime to cheat a man into his duty; that the subsequent transfer of the note after maturity was immaterial, if a fact, and could not injure Jones, if he took the proper precautions.

In *Re Cameron*, 44 Kan. 64, Mrs. Cameron recovered possession of an organ she had sold, and on which there were due payments, under which the organ might be taken, by making several false statements. The court said: "It is not an indictable offense, under the statute, for one to obtain by false statements payment of a debt already due, or personal property to the possession of which he is entitled, because no injury is done."

One of the leading cases on this head is *People v. Getchell*, 6 Mich. 496. Defendant was agent of the prosecutor in running a store, for which prosecutor was to furnish not exceeding \$4,000 at any one time,

and, after paying the prosecutor rent and liquidating debts, defendant was to have one-half the net proceeds. That amount of capital was never furnished, and defendant was charged with getting prosecutor to indorse a duplicate note for \$150 by false pretenses. A short time after prosecutor took possession of the store. The court below would not allow prosecutor to be questioned as to whether he had acknowledged himself to be a partner with defendant, or whether he had paid debts of the store, or as to statements defendant made to him regarding the condition of the business, and refused to allow the written contract between them, which fully set forth their mutual obligations, to be read in evidence. The court held all of this to be error; that the gist of the offense was not merely the false statements, but the intent to defraud, which should have been shown; and that the evidence offered might have disclosed that no fraud was designed, but that defendant was rather seeking to make prosecutor live up to his agreements in meeting the obligations of the business.

Failure to perform contract or return money.—A statute to protect employers provided that any person entering into a written contract with his employer with intent to defraud him, and then with like intent, and without just cause, refuses to perform the services or return the money, etc., should be punished as for larceny. The defendant agreed to work for the prosecutor for one year at \$9 per month, receiving \$20 in advance, and at the end of seven months quit work. It was held that, as the object of the statute was to protect the employer for advances made, he could have done all that the statute contemplated; that he could have retained from the monthly payments sufficient money to have indemnified himself for the \$20; and that the defendant was not guilty of defrauding him. *McIntosh v. State*, 117 Ala. 128, 23 So. Rep. 668 (1898).

Drawing a check on a bank scarce of funds not a crime.—Prosecutor testified that, in return for a loan of \$20 by a check, the defendant gave him a check on another bank, which was not paid, but did not remember whether defendant told him that he had funds in the bank, and could not say that he cashed the check on such representation, but cashed it because he believed it to be good. From defendant's statements about having cattle at the depot, he inferred that he was a cattle man and that his check was good. The court held that the evidence did not justify a verdict. That drawing a check on a bank that did not have funds to meet it was not a crime, but that there must be some false representation in fact, some deceitful means and methods resorted to, as that "the party has money in the bank, or that the check will necessarily be cashed, or something of this kind." *Blackwell v. State*, 51 S. W. Rep. 919 (Tex. Ct. Cr. App., 1899).

Defective indictments.—Allegations that one of the defendants would indorse certain notes, and assign and transfer them, are not in harmony with other allegations that the notes were assigned and transferred; the latter terms do not include, and are not synonymous with, indorsement; the latter might be done without the former. *State v. Nine*, 105 Iowa, 131, 74 N. W. Rep. 945 (1898).

An indictment was held fatally defective because it failed "to clearly

and specifically allege that the party who parted with his goods, or gave the credit, relied upon the representations, and but for said statements would not have extended credit or parted with his goods, or similar allegations." *Bryant v. Commonwealth*, 20 Ky. Law R. 790, 47 S. W. Rep. 578.

State v. Fraker, 148 Mo. 143, 49 S. W. Rep. 1017 (1899), presents some interesting points. Fraker was indicted for an attempt to cheat a life insurance company by fraudulent practices, it being charged that he obtained a policy and made a will in one county, and that he falsely pretended that he was drowned in another, and that his executor innocently obtained a judgment against the insurance company in another county. It was held that enough should be alleged to clearly show a completed offense in some one county, and so, definitely set forth the acts. Defendant's pretending to fall into the Missouri river in one county would not constitute an offense in another county; and the indictment did not specify to whom the false representation of pretending to fall in the river was made; nor was it alleged that he intended that such pretense of drowning should be used to obtain money, etc. Neither was it charged that he instigated the executor to probate his will and collect the insurance, but it was alleged that the executor proceeded in good faith. The representations that procured the judgment against the insurance company were made by the executor, and not by the defendant, and he would not be held responsible for them, unless it was clearly charged and shown that he instigated them.

Indictment—Insufficient description.—Some highly appropriate and forceful views are expressed by the Supreme Court of New Jersey in the contemporaneous case of *State v. Appleby*, 63 N. J. 526, 42 Atl. 847 (1899), on criminal pleading. Indictment for false pretenses. "A large amount of dry and fancy goods of the value of 2,700 dollars," without more, does not describe and designate the property with certainty. It does not inform the accused of the nature and cause of accusation against him, so that he may prepare to meet the charge. It does not clearly identify the offense as the same which the grand jury investigated; neither he, nor the court, could determine that question from such a description. To assume that the defendant would know, outside of the indictment, the particulars of the charge against him, and that a slight suggestion of a single circumstance would call to his mind the whole affair, is to assume that he is guilty, whereas the presumption of the law is that he is innocent, and perhaps ignorant of the transaction, and therefore compelled to seek in the indictment the information necessary to apprise him of the charge and enable him to properly meet it.

Defendant's failure to pay for the goods; prosecutor taking a mortgage on the goods; and what defendant did with, and said about, the goods obtained, a year after.—On these questions the Supreme Court of Alabama made the following pertinent observations in *Meek v. State*, 117 Ala. 116, 23 So. Rep. 155 (1898):

"We are of opinion the court erred in permitting the State to prove that defendant had never paid for the goods he obtained. If the offense charged was committed at all, it was committed at the time the

goods were obtained. If they were obtained by means of the false pretense alleged, with the intent at the time to defraud, the offense was complete, and, though the defendant may have afterwards repented, and paid for the goods, even on the very day due, he was none the less guilty by reason thereof; and *eo converso*, if, when he obtained the goods, he had no intent to defraud, or had not made the alleged false pretense which induced the party to part with the goods, he was not guilty at all, whether he afterwards paid for them or not, and without regard to whether he afterwards formed a fraudulent intent not to pay for them. (*Carlisle v. State*, 77 Ala. 71.)

"The court permitted the State to prove by the witness Collins that he took a mortgage from defendant at the time he sold him the goods, to secure the debt. The defendant objected to the proof as being irrelevant and immaterial, and because the mortgage was not produced, and his objection was overruled, and he excepted. We think the defendant is not in a position to allege error in this ruling, for the reason that the evidence was beneficial to him, and prejudicial to the State. It furnished evidence to the jury from which they might have inferred that the sellers were induced to sell their goods in reliance upon the mortgage security, rather than upon the representations alleged in the indictment. Unless by some action or ruling, which does not appear to have occurred, this evidence was perverted to other than its legitimate bearings, we cannot conceive how it is possible for the defendant to have been otherwise than benefited by its introduction. It would clearly have been admissible evidence for him if he had offered it himself as a means of showing an inducement to part with the goods, other than that charged. We must hold, however, that technically the State had no right to introduce the mortgage, nor evidence of its contents. It did not tend to prove any allegation of the indictment. Nor was it competent for the State to prove the declaration of the defendant at the time of the transaction that he owned the articles of property, though, properly viewed by the jury, it was likewise beneficial to the defendant as going to show that the ownership of the property was the inducement to the firm to sell the goods.

"The testimony of the several witnesses as to the efforts to gather up the mortgaged property, and what defendant said and did as to what had become of the property, the next year after the goods were obtained, shed no light upon the inquiry whether he (defendant), with intent to defraud, falsely represented, perhaps a year before, that 'he lived in Geneva county, Alabama, and was preparing to make a crop in Geneva county for the year 1893,' and by means of such false pretense obtained goods, etc."

Where the seller retains title to the goods, false pretenses do not apply.—Defendant bought a harvester, giving a note to the sellers in which it was stipulated that the title or possession would not pass from the sellers until the note was fully paid, and that the sellers could, at any time that they felt insecure, take possession of the harvester, etc. It was held that he was not guilty of obtaining property by false pretenses, since the sellers did not part with the title to the

property and could resume possession of it at any time; the defendant not even acquiring an unqualified right to the possession. *State v. Anderson*, 47 Iowa, 142. Reported in 2 American Criminal Reports, p. 100.

BURDEN v. STATE.

120 Ala. 388—25 So. Rep. 190.

Decided February 11, 1899.

FORGERY: *Indictment—Innocuous writing.*

1. A writing purporting to give the value of an article, without more, is not the subject of forgery.
2. A writing that does not disclose on its face the necessary elements to injure or defraud cannot become the subject of forgery unless extrinsic facts are alleged, clearly showing such elements, and their connection with the writing.

Willie Burden, convicted of forgery in the City Court of Selma, Hon. John W. Mabry, Judge, appeals. Reversed.

Charles G. Brown, Atty. Gen., for the State.

Mallory, McLeod & Mallory, for the appellant.

The opinion explains the facts.

MCCLELLAN, C. J. It may be that a writing in the following words, viz.: "Mr. Holmes, Selma, Ala.—Dear Sir: The value of this chain is \$10.00 (ten),"—is the subject of forgery, under certain circumstances extrinsic to the paper itself. Even this we do not decide, however. But it is most clear that on its face this writing, by whomsoever signed or purporting to be signed, does not create, discharge, increase, or diminish a money liability, or transfer or incumber property, or release or impair an existing claim to or lien upon property; and if extrinsic facts exist, which, taken in connection with the paper, impart to it a capacity to injure or defraud, they should have been averred in the indictment. No such facts are alleged in this indictment, and therefore neither of its counts charges any offense. *Rembert v. State*, 53 Ala. 467; *Dixon v. State*, 81 Ala. 61, 1 So. Rep. 69; *Williams v. State*, 90 Ala. 649, 8 So. Rep. 825. The

construction put upon the words, "or any instrument or writing, being or purporting to be the act of another," in section 4720 of the Code, would lead to this: that if a man signed the name of another to a statement that the earth is round, or that the moon is made of green cheese, or other like entirely innocuous assertion, by means of which there is no possibility of any person being injured or defrauded, he would be guilty of forgery. The statute is not open to such interpretation, we think; and we reiterate, with respect to the present form of the provision, what has been many times declared by this court: A writing, to be the subject of forgery, must, either upon its face, or by reason of attendant circumstances, have, upon the assumption of its genuineness, a capacity to injure or defraud. The trial court erred in overruling the demurrer to the indictment. For this the judgment of conviction will be reversed, and the cause will be remanded.

CRAWFORD V. STATE.

40 TEX. CRIM. REP. 344—50 S. W. REP. 378.

Decided March 22, 1899.

FORGERY: *Defective indictment—Defective instrument—Variance.*

1. An indictment charging that defendant Crawford passed a forged written instrument, containing these words: " . . . Mr. W. P. Williams and Brother—Sir: You will please let Jasper Crawford hav too par of shoes, one pond of to Baker. (Signed.) E. P. Fraser," is fatally defective. Said writing is on its face unintelligible. To make it intelligible there should be explanatory averments.
2. The writing is a mere request and purports no obligation, no liability, no one to whom the goods were to be charged; nor does it appear who "Williams and Brother" were, nor that they (or he) had goods to sell, etc.
3. There is a variance between the name of the defendant and that of the recipient.

Jasper Crawford, convicted of passing a forged instrument in the District Court of Shelby county, Hon. Tom. C. Davis, Judge, appeals. Reversed.

J. O'B. Richardson, for the appellant.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of passing, as true, a forged instrument, and his punishment assessed at confinement in the penitentiary for a term of two years, and he appeals.

The indictment charged Jasper Crawford with passing, as true, the following forged instrument in writing, purporting to be the act of another, to wit, the act of E. P. Fraser, which said false instrument is to the tenor following: "March the 31st, '98. Mr. W. P. Williams and Brother—Sir: You will please let Jasper Craford hav too par of shoes, one pond of to Baker. [Signed] E. P. Fraser." Motion in arrest of judgment was filed by appellant on the ground that the indictment did not affirmatively show that the said instrument alleged to have been forged and passed was such an instrument as, if true, would have created, increased, diminished, discharged, or defeated any pecuniary obligation, etc., and did not, of itself, contain sufficient words as to be complete, without other allegations in the indictment showing such extrinsic matters, and explanatory allegations and innuendoes, as is necessary to make the same sufficient in law to charge this defendant with forgery or passing the same as true. Said indictment should have shown that "W. P. Williams and Brother," or "W. P. Williams," mentioned therein, was a merchant, and had such goods to sell as were mentioned in said instrument (if such was the case), and that said E. P. Fraser, the purported maker of said order, or the said Williams, one or both, could have been injured by same. Said indictment should have shown, by specific allegations, what was meant and intended by the words, "too," and "pond of to Baker," and other words contained in said indictment, which are not plain and intelligible; and because there is a variance between the name of "Jasper Craford," as contained in the tenor clause of the indictment, and "Jasper Crawford," the alleged defendant. In our opinion, the grounds urged were well taken, and the motion in arrest of judgment should have been sustained. See *Womble v. State*, 39 Tex. Crim. Rep. 24, 44 S. W. Rep. 827. In that case we discussed somewhat

the prior decisions on this subject; among others, the case of *Hendricks v. State*, 26 Tex. Crim. App. 176, 9 S. W. Rep. 555, and *Rollins v. State*, 22 Tex. Crim. App. 548, 3 S. W. Rep. 759; but the instruments set out in said cases were in some respects more complete than this. In both instruments, as a part thereof, the words "charge to" were contained therein; but here there is no request in the instrument as set out to charge the goods to any one, but merely to let Craford have the certain goods mentioned. For aught that appears, it may have been an accommodation request; that is, it does not on its face import an obligation. It is not an order to charge the goods to any one. Nor are we informed who "Williams and Brother" were. Extrinsic explanatory averments should have been used in this indictment in connection with this instrument; and, besides, innuendo averments should have been used, showing what was meant by the misspelled and ambiguous words used in the instrument. For the errors discussed the judgment is reversed, and the prosecution ordered dismissed.

DAVIDSON, P. J., absent.

NOTE.—A very clear opinion on the *lack of legal liability* in an alleged forged writing was that in the case of *Waterman v. People*, 67 Ill. 91. It purported to have been signed by the superintendent of the Del. & H. Can. Co., and ran: "To any Railroad Superintendent: The bearer, T. H. Wiley, has been employed on the A. and S. R. R. as brakeman and freight hand. He goes west to find a more lucrative position. Any courtesies shown him will be duly appreciated and reciprocated, etc. H. A. FONDA, Supt." The defendant and others were accused of having, with intent to defraud the C., R. I. & P. R. R. Co., attempted to pass it as true, etc., the same being false, etc. They were convicted. The court, after remarking that the indictment failed to show any connection between the party to whom the writing was addressed and the railroad company, nor that defendants attempted to pass it upon that company, said: "The writing, if genuine, has no legal validity, as it affects no legal rights. It is a mere attempt to receive courtesies on a promise, of no legal obligation, to reciprocate them. We are satisfied the writing in question is not a subject of forgery, and no indictment can be sustained on it, and no averments can aid it. It is a mere letter of introduction which by no possibility could subject the supposed writer to any pecuniary loss or legal liability. As well remarked by the prisoner's counsel, courtesies are not the subject of legal fraud." Prisoner discharged.

DAVIS v. STATE.

58 Neb. 465—78 N. W. Rep. 930.

Decided April 19, 1899.

FORGERY: *Proving similar acts—Charging intent—Copy of instrument and necessary averments.*

1. "It shall be sufficient in any indictment where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person or body corporate." Criminal Code, § 417; *Roush v. State*, 34 Neb. 325, 51 N. W. Rep. 755; *Morearty v. State*, 46 Neb. 652, 65 N. W. Rep. 784.
2. In a trial on the charge of uttering forged instruments, evidence of similar acts on the same day may be received to show the guilty knowledge or the intent of the accused in the act charged.
3. In an information of the uttering a forged written or printed instrument there should be set forth a copy or the purport of each material portion of said instrument.

(Syllabus by the Court.)

Error to the Douglas County District Court, Hon. W. W. Slabaugh, Judge, on behalf of George Davis, convicted therein of forgery. Reversed.

Macfarlane & Altschuler, for the plaintiff in error.

C. J. Smyth, Attorney-General, and *W. D. Oldham*, Deputy Attorney-General, for the State.

HARRISON, C. J. The plaintiff in error was charged in an information filed in the district court of Douglas county with the forgery of railroad passenger tickets in one count of the information, with uttering forged tickets in a second count, and with having such tickets in his possession in a third count. During a trial the third count was abandoned by the State, and the trial jury returned a verdict by which the plaintiff in error was pronounced not guilty of the charge in the first count and guilty of that in the second. After motion for a new trial, heard and overruled, the accused was sentenced to imprisonment in the penitentiary for a term of three years. In the error proceeding to this court it is complained that the information was insufficient, in that it charged the intent to defraud in general, and not as to any specific or designated person, etc. It is in this

connection urged that the doctrine announced by this court in *Roush v. State*, 34 Neb. 325, 51 N. W. Rep. 755, and *Morearty v. State*, 46 Neb. 652, 65 N. W. Rep. 784, that to state the intent to defraud generally will suffice, is radically wrong, and should be overruled. The decisions to which reference is made do not state or publish a rule other than is plainly and clearly, without ambiguity, expressed by the legislature in section 417 of the Criminal Code, wherein it is prescribed in unequivocal terms, and with no necessity or room for construction, that: "It shall be sufficient in any indictment where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person or body corporate." With this in view, we must adhere to the decisions which have been herein made the subject of attack.

The evidence tended to prove that on July 2, 1898, the plaintiff in error sold the ticket upon the sale of which the charge in the information was predicated to a "ticket broker" in Omaha. It purported to be the return portion of an excursion ticket from Chicago to Council Bluffs and return. There was also evidence that on the same day the plaintiff in error, in the same city, made quite a number of other sales to different ticket brokers of similar tickets, differing probably only in the number. Each ticket had a specific number. They all appeared to have been issued by one road. The reception of this evidence of the sales other than the one of the ticket declared upon in the information was assigned for error, and the assignment is now urged. The general rule is that the evidence of the commission or attempt to commit a crime similar to the one charged is inadmissible. *Morgan v. State*, 56 Neb. 696, 7 N. W. Rep. 61; *Berghoff v. State*, 25 Neb. 213, 41 N. W. Rep. 136; *Davis v. State*, 54 Neb. 177, 74 N. W. Rep. 599. But an exception has been quite uniformly made in trials of some charges, of which is the one in the case at bar, where it is necessary to show the intent or guilty knowledge of the accused. The evidence in this case of these similar acts was not to show that the party charged had committed other similar distinct crimes, but to bear upon the question of his knowledge of the quality of his act, and the intent with which he did it. The acts of sales of tickets by the

plaintiff in error were all of one date, of similar tickets, in all particulars so nearly identical as to be almost connected, and were clearly within the reason of the exception to the general rule. The purpose of, and the effect to be given to, the evidence of the other similar acts should have been outlined and enforced by an instruction. *Knights v. State*, 56 Neb. 225, 78 N. W. Rep. 508. For a statement in regard to the exceptions to the general rule, see Roscoe's Criminal Evidence (7th ed.), 92. In its support there is cited *Knights v. State, supra*; *State v. Raymond*, 53 N. J. Law, 260, 21 Atl. Rep. 328; *Commonwealth v. McCarthy*, 119 Mass. 354; *Pierson v. People*, 79 N. Y. 424; 1 Rice, Evidence, 453.

The count of the complaint of the charge of which the plaintiff in error was adjudged guilty was in part as follows: "And the said Howard H. Baldrige, county attorney, as aforesaid, upon his oath, and by the authority aforesaid, further gives the court to understand and be informed that the said George Davis, on the said 2d day of July, in the year aforesaid, in the county of Douglas and State of Nebraska aforesaid, then and there being in said county, and then and there having in his custody and possession a certain false, forged, counterfeited, and falsely printed ticket, purporting to have been issued by the Chicago & Northwestern Railroad Company, of the purport, value, and effect following, to wit." Here was inserted a copy of what appeared on the face of the ticket, and further: "Then and there knowingly and feloniously did utter and publish the same as true and genuine, with the intent then and there and thereby unlawfully to defraud; he, the said George Davis, then and there well knowing said false, forged, and counterfeited ticket as aforesaid to be false, forged, and counterfeited." On the back of the ticket there was stamped: "C. & N. W. Ry. W. W. Coup, Ticket Agent, Jul. 1., 1898. 22 Fifth Ave., Chicago." This was omitted from the complaint. It will be seen from the quotation we have made that the charge was of uttering a ticket "purporting to have been issued by the Chicago & Northwestern Railroad Company." It was testified that a part of the act of issuance of each ticket by an agent was to stamp it on the back similarly to what appeared on the one upon which the complaint was founded, the date in the stamp to be that of the issue; that

the impress of the stamp appears is evidential of the act of issuing the ticket. Whether the impress of the stamp on the back of the ticket herein immediately in question was spurious or genuine was a subject of specific inquiry during the trial, was a material fact in the establishment of the charge in the information; so much so that it may be said that it was elemental of the accusation, and, if so, it should have been of the description in the information of the alleged forged and uttered instrument; and, as it was omitted therefrom, the information was not of the crime of which proof was received, and there was a variance. *Roode v. State*, 5 Neb. 174; *Haslip v. State*, 10 Neb. 591. There are other assignments of error, but we deem their discussion at this time unnecessary. For the error indicated, the judgment must be reversed and the cause remanded. Reversed and remanded.

WOMBLE V. STATE.

39 Tex. Crim. Rep. 24—44 S. W. Rep. 827.

Decided March 8, 1898.

FORGERY: *Explanatory averments, when necessary—Evidence.*

1. Where the indictment sets out the alleged forged instrument as follows: "May 22, 1897, Mr. Brin, Ples let John Womble hame ine thing that he wornt—J. O. Thompson," without any explanatory averments, *held*, that the indictment was fatally defective.
2. Evidence that the defendant was generally reputed to be a fool is not competent to prove insanity.

Appeal from the Kaufman County District Court; Hon. James E. Dillard, Judge.

John Womble, convicted and sentenced to two years' imprisonment in the penitentiary for attempting to pass a forged instrument, appealed. Reversed.

J. D. Cunningham, for the appellant.

Mann Trice, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of attempting to pass as true an alleged forged instrument in writing, and his

punishment assessed at confinement in the penitentiary for a term of two years, and he prosecutes this appeal.

Motion was made to quash the indictment in the court below, on the ground: "First, because it charges no offense against the statute; second, the same is insufficient, because it does not allege that said false instrument would have incurred, diminished, discharged, or defeated any pecuniary obligation, or in any manner have affected any property whatever; third, the same is insufficient because vague and uncertain, and there are no explanatory words showing the meaning of the words used in the indictment, so as to make sense of the same." The motion was overruled, and appellant reserved his bill of exceptions. The charging part of the indictment is as follows: That defendant "did wilfully, knowingly, and fraudulently attempt to pass as true to H. D. Kirsch a forged instrument in writing, to the tenor following: 'May 22nd—1897. Mr. Brin, Ples let John Womble hame ine thing that he wornt. J. O. Thompson,'—which said instrument in writing the said John Womble then and there knew to be forged, and did then and there so attempt to pass the same as true, with intent to injure and defraud." The contention here is that the instrument, on its face, without explanatory averments by way of innuendo, does not import on its face such an obligation as is the subject of forgery. We think the objection well taken. Certainly, the use of the words "hame," "ine," and "wornt," should have been explained by innuendoes. More than this, in our opinion the indictment should have alleged, by a proper innuendo, the object and purpose of said order. If Mr. Brin was a merchant, and had goods for sale, this should have been alleged.

This opinion does not seem to be in exact accord with the case of *Hendricks v. State*, 26 Tex. Crim. App. 176, though the instrument in that case was in plainer terms than that upon which the forgery was predicated in this case. However, the rule here enunciated is in accord with *Rollins v. State*, 22 Tex. Crim. App. 548. In that case, however, there were innuendo averments. This is apparent from the opinion, though the indictment is not set out. See also *King v. State*, 27 Tex. Crim. App. 567; *Simms v. State*, 32 Tex. Crim. Rep. 277; *Daud v. State*, 34 Tex. Crim. Rep. 460; *Shannon v. State*, 109 Ind. 407, 10

N. E. Rep. 87; *Baysinger v. State*, 77 Ala. 63; *Henry v. State*, 35 Ohio St. 128; *State v. Wheeler*, 19 Minn. 98 (Gil. 70).

The court did not err in refusing to permit defendant to prove the reputation of appellant as being a fool, and that he was by common reputation regarded of unsound mind. Insanity is not provable by reputation. We find no error in the charge of the court; nor was there any occasion to give the special requested charges. For the error of the court above discussed in refusing to quash the indictment, the judgment is reversed and the cause dismissed.

Reversed and dismissed.

ELDRIDGE V. STATE.

76 Miss. 353—24 So. Rep. 313.

Decided December 19, 1898.

FORGERY: *Evidence—Identity of forged instrument.*

1. There can be no conviction of forgery where there is no proof that the instrument in writing was uttered by the accused.
2. There can be no conviction for the statutory felony of knowingly having in one's possession a forged instrument with intent to utter the same, where the evidence does not identify the document found in the defendant's possession with that set out in the indictment.
3. Where two orders were introduced in evidence, the statement by a witness, "that is the order," is not a sufficient identification, as it does not refer to either one in particular.

Appeal from the Lee County Circuit Court, Hon. E. O. Sykes, Judge, by Frank Eldridge, convicted of forgery. Reversed.

Two counts,—the first charged forgery; the second having the forged instrument in his possession with intent, etc. Tenor of instrument in both counts was: "Mr. F. Elliott, You will please let bearer have the sum of \$7 and 40 cents in money. I ever he wants, and charge to me, yours truly, Hussey."

The State gave in evidence two written orders, one like those in the indictment, signed "Hussey," and the other differently signed. The prosecuting witness and his clerk testified that the order presented to them was signed "C. C. Hussey" and was

minus the word "money," which was in the copies in the indictment. A witness who arrested defendant said that he found two orders on defendant then. The court refused to exclude the State's evidence on the ground of variance.

W. L. Clayton, for the appellant.

Wiley N. Nash, Atty. Gen., for the State.

WHITFIELD, J. It is clear that no conviction could have been had in this case, on the testimony in the record, under the first count. Neither of the orders offered in evidence was the one passed on Elliott. Can the conviction be sustained on the proof here, under the second count? That count charges that appellant, having in his possession, etc., with the intent to utter and publish the same as true, and with the intent to defraud the said Elliott, etc. Doubtless the proof of the specific intent here charged may be "inferred from the circumstances of the possession," as stated in 2 McClain's Crim. Law, § 786, and in *People v. Ah Sam*, 47 Cal. 656, coupled with the fact that the order is drawn on Elliott.

But there is absolutely no identification in the proof of the order signed "Hussey" as being the one found in the possession of the defendant. The testimony of Elliott and McAllister relate alone to the order passed signed C. C. Hussey, without the word "money" in it, and on which McAllister had written, "Paid to Henry Tackert." Neither one of these witnesses knew what order was found on defendant's person.

The witness Keys never identified the order found on defendant's person. Two orders were in evidence. He was asked, "Look at that paper and see what it is," and answered, "That is the order." What paper? What order? Which one of the two? How can this court tell from such a transcript which one of the two orders was meant?

It was very easy to have had the witness identify the order found on defendant's person, as the one signed "Hussey," in such a way as would make the record show the identity. Unless we are to assume, without proof in the record, that the order signed "Hussey" was the one found in defendant's possession, we cannot affirm this judgment.

Judgment reversed, verdict set aside and cause remanded.

PEOPLE V. BIRD.

124 Cal. 32—56 Pac. Rep. 639.

Decided March 15, 1899.

FORGERY: Other forgeries—Opinions of witnesses—Burden of proof—Incompetent evidence—Finding of check photographs—Hostility of prosecuting witness.

1. Upon the trial of a defendant charged with the forgery of a check, where there is a conflict of evidence as to the genuineness of the check, the prosecution assumes the burden of proof to connect the defendant with other forgeries to show guilty knowledge; and evidence of other forgeries of checks is not admissible where there is no evidence tending to connect the defendant therewith other than the suspicion arising from the fact that defendant was the confidential clerk of the prosecuting witness, who did not testify to a knowledge of the defendant's handwriting, and based his opinion that the defendant wrote the checks upon the fact that he did not recollect drawing them, and thought the money had not been used in his business.
2. Evidence that a blank check to which the name of the prosecuting witness appeared to be signed was torn up by him and thrown in the waste basket long after the defendant was arrested, and that it was afterward found in a square desk said to be occupied by the defendant, without further evidence connecting the defendant with the blank or the desk, is incompetent, and its admission is erroneous.
3. It is matter within the discretion of the court to require the prosecuting witness to point out upon enlarged photographs the difference between his signatures alleged to have been forged and those admitted to be genuine.
4. A witness may be permitted to state the grounds of an opinion to which he has testified; and such statement is not objectionable as being necessarily argumentative.
5. The defendant should be permitted to prove that the prosecuting witness had endeavored to persuade one of the sureties on his bail bond to withdraw, as tending to show a degree of hostility and persecuting spirit on the part of the witness, which, in the opinion of the jury, might affect the value of his evidence. The fact that it already appeared that the prosecuting witness was hostile could not supply the place of such proffered testimony.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial; Hon. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

C. W. Pendleton, Edwin A. Meserve, and J. L. Copeland,
for the appellant.

W. F. Fitzgerald, Atty. Gen., and Charles H. Jackson, Dep.
Atty. Gen., for the respondent.

TEMPLE, J. Defendant appeals from a judgment upon a verdict convicting him of forgery, and from a refusal of a new trial. Defendant was employed as clerk by G. J. Griffith, and is prosecuted for forging his employer's name to a check on the First National Bank of Los Angeles for two hundred dollars, with intent to defraud Griffith and the bank.

It was proved that defendant presented the check to the bank and obtained the money thereon, and Griffith testified that he, the witness, did not draw the check and had not authorized defendant to do so; and further, that the money drawn was not used by him, Griffith, or for his benefit. On the other hand, Grove, the bank teller who paid the check, and Mr. Hammond, the assistant cashier of the bank, both testified that in their opinion the check was genuine.

There being, then, a conflict as to whether the check was genuine or not, the prosecution introduced a number of checks, drawn in the name of Griffith on the same bank, which he swore were forgeries, and had been paid, to his damage in the sum of about twelve hundred and fifty dollars. There was no evidence whatever tending to connect Bird with these forgeries—if they were such. A suspicion may have been suggested that as Bird had drawn the money upon one check, alleged to have been forged, he probably was guilty of the other forgeries, and had been systematically committing such forgeries. As he was the confidential clerk of the prosecuting witness, suspicion would more naturally attach to him.

If proof had been forthcoming to show the connection of defendant with these other checks which were said to have been forged, still such coincidence is not admissible to prove the *corpus delicti*, but only after that has been established to show guilty intent. And the prosecution assumed the same burden of proof as to each of the checks introduced to show guilty knowledge as in regard to the check for which he is being tried. *People v. Whiteman*, 114 Cal. 338.

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As to some of these checks, Griffith testified that he believed the signature to be Bird's signature—meaning, perhaps, that he believed that Bird signed his, the witness,' name. He does not say that he knew Bird's handwriting, or why he believed that Bird wrote it. Indeed, there is much to show that his opinion resulted simply from the fact that he did not recollect drawing the check, and thought the money had not been used in his business. There can be no doubt that the evidence was improperly admitted.

Griffith was allowed to testify that he had been handed a blank check to which his name appeared to have been signed, which blank he immediately tore up and threw into the waste basket. Upon objection being made, the district attorney stated that he would follow it by testimony showing where it was found. This occurrence was long after defendant had been arrested, and it was not proposed to show that Griffith's name had been signed to the blank by Bird, or that Bird had ever seen it, otherwise than by showing where it was found. Afterward one Hoyle was sworn and testified, under objection, that he examined the contents of a square-top desk "said" to be the desk occupied by Bird, and found among them the blank check in question. When he found it, or in whose custody the desk had been, or whether others occupied it as well as Bird—if it can be assumed that Bird did occupy it—was not shown. There was no other testimony connecting Bird with the blank, or with the desk. The evidence was clearly incompetent.

There are some other alleged errors, but of less consequence than those already alluded to, and which do not call for extended notice. I think it was a matter within the discretion of the court whether Griffith should have been required to point out upon the enlarged photographs the difference between the signatures alleged to have been forged and those admitted to be genuine. The court also properly excluded evidence as to what Hammond said to Griffith as to one of the checks, but I think that Gibson should have been permitted to state the grounds of an opinion that it was argumentative; also that the defense should have been permitted to prove that Griffith—the prosecuting witness—had endeavored to persuade one of the sureties on defendant's bail bond to withdraw. The fact that it already

appeared that Griffith was hostile did not supply the place of the proffered testimony. If true, such evidence would tend to establish a persecuting spirit, and a degree of hostility which, in the opinion of the jury, might affect the value of his evidence.

The judgment and order are reversed and a new trial ordered.

HENSHAW, J., and McFARLAND, J., concurred.

NOTES (by H. C. G.).—*Altering a deed.*—A very important opinion on this question is to be found in *Johnson v. State*, 40 Tex. Crim. Rep. 605, 51 S. W. Rep. 382 (1899). Defendant and one T. joined in executing a deed of the Johnson homestead to S., and T. inserted, as one of the conditions, that S. should convey certain premises to him (T.), it seeming that T. was guarantor for defendant on some debt. When defendant and the notary took the deed to Mrs. Johnson, she refused to sign it until after the said condition was eliminated, and defendant erased it. It seems the title was in Mrs. J. It was held that if the title was in Mrs. J., then there could be no valid deed until after her execution of it. That consideration was not, however, material, for the premises being the *homestead*, there could be no conveyance without her execution and privy acknowledgment, and the erasure having been made before she executed the deed, there was no alteration of a deed, and no forgery. The fact that defendant and T. had already signed and acknowledged the deed cut no figure, because their acts only became valid and binding upon her executing the deed, and her execution could not relate back and restore the erased condition, so as to make it the subject of forgery.

A nudum pactum instrument cannot be the subject of forgery.—In *People v. Parker*, 114 Mich. 442, 72 N. W. Rep. 250 (1897), the defendant was charged with uttering, etc., a forged, etc., written order, promissory note, writing, etc., as follows: "Canvass of 1896. 428. Name, Stewart-Hartshorn Co. hereby agree to pay, on publication, \$65.00 (sixty-five dollars) for the insertion of 1 page and 1 display heading. Stewart-Hartshorn Co., name of firm, . . . 520 W. Ave. Business, Shade-rollers,"—with intent, etc. The court said: "We think it is well settled that to constitute forgery at the common law the forged instrument must be one which, if genuine, would bind another, and that it must appear from the indictment that such is its legal character, either from the recitals or description of the instrument itself, or, if that does not show it to be so, then by averment of matter *aliunde* which will show it to be of that character." The court also pointed out that this instrument was not among those designated by law as the subject of forgery; that it did not show an obligation on any one to pay—no consideration as a basis for the payment—silent as to what was to be inserted, what the company was to pay for, and, in short, that it was a *nudum pactum*, unenforceable at law, and uninjurious.

Repugnant averments.—The indictment charged that the defendant "defaced, altered, forged and counterfeited a certain written receipt,

etc." This was held to be repugnant, because, while a counterfeited writing is wholly false, an altered one implies that the original was genuine before it was altered. *State v. Bracken*, 152 Ind. 565, 53 N. E. Rep. 838 (1899).

Repugnant and variant.—The charging clause was that defendant forged an indorsement on a treasury warrant purporting to be the act of "Wm. M. Cooke, Jr.," the warrant being payable to the order of Wm. M. Cook, per W. M. Cook, Jr., and then set out the false indorsement as "Wm. Cook, per Wm. M. Cook, Jr.," etc. These clauses were held to be repugnant and variant, because according to the latter allegations Wm. Cook was the principal and the party to be bound, Wm. M. Cook, Jr., only acting for him, while in the former the forgery was charged as that of Wm. M. Cooke, Jr. *Thulemeyer v. State*, 38 Tex. Crim. Rep. 349, 43 S. W. Rep. 83.

Uncertain and defective was an indictment that charged the forging of the name of Mrs. Austin, to wit, Sue E. Austin, to an order for fifty cents—witness fees—the order set out purporting to have been signed simply by a "Mrs. Austin." *State v. Chinn*, 142 Mo. 507, 44 S. W. Rep. 245 (1898).

Variance.—It was charged that J. N. Webb made a false instrument signed J. N. Webb, J. R. R., and S. E. D. The instrument produced in evidence purported to be signed by S. E. D., J. R. R. and N. Webb. Held, that there was a fatal variance. *Webb v. State*, 39 Tex. Crim. Rep. 534, 47 S. W. Rep. 356 (1898).

Not repugnant.—But where there was a discrepancy between the tenor of the forged instrument as set forth and the indorsement thereon, it was held that there was no repugnance, because the gravamen of the charge was the false making of the instrument itself, and not of the indorsement, and the latter need not have been set out. *Leslie v. State* (Tex.), 47 S. W. Rep. 367.

Forging a receipt on a money order is not forging the order.—The indictment charged defendant A. P. Pierce with having forged a United States postal money order, and also that he obtained the money thereon by falsely receipting in the name of R. H. Pierce, the payee. The court held that forging a receipt attached to the order was wholly different from forging the order itself; to establish the latter, it should be shown that he impersonated the postmaster; that the indictment was defective, and that there was a variance between it and the evidence, which was that he signed the receipt. *Pierce v. State*, 38 Tex. Crim. Rep. 604, 44 S. W. Rep. 292 (1898).

Tinctured with ambiguity.—The forgery as set out—"Mr. Thompson, dear sir, if you please let the negro have some kind of a buggy he is alwrit— . . . —you neants to be afraid of him— . . . —a pair of harness too if you have one— . . . —let him have it." Signed "A. J. Hurley" (on the reverse side). The indictment contained a number of averments explanatory of the latent and patent ambiguities, among which was one stating that Mr. T. was E. E. T., a member of Thompson Bros. Still the indictment was held defective, for it did not appear who composed the firm of Thompson Bros., but worst of all, it did not appear *what* negro was charged with the offense, and it

would not do to assume that it was the defendant. *Colter v. State*, 40 Tex. Crim. Rep. 165, 49 S. W. Rep. 379 (1899).

Handwriting immaterial.—Defendant was convicted of passing a forged instrument. He had asked for a continuance, among other things, to procure witnesses as to his handwriting. The court held that he was not prejudiced on that score, since the State's case was made out even though the forgery was not in his handwriting. *Leslie's Case*, second note, *ante*.

Improper cross-examination.—It was permitted to cross-examine the defendant, on trial for forgery, as to whether he got money from the Loan & T. Co. on the forged check, he not having testified on that subject on his direct examination. This evidence, it was held, was a part of the prosecution's case, and it had no right to make the defendant supply its deficiencies. *People v. Dole*, 122 Cal. 486, 55 Pac. Rep. 581.

Evidence of passing under assumed names, and of having been arrested for drunkenness, was held to have been inexcusably admitted against the defendant on trial for forgery. Whatever may be the rule as to cross-examining the defendant as to his prior conviction for felony, it cannot be allowed that such disparaging evidence may be given in chief. The defendant cannot be required to defend against anything but the specific charge against him. *People v. Arlington*, 123 Cal. 356, 55 Pac. Rep. 1003 (1899).

DUNN v. PEOPLE.

172 Ill. 582—50 N. E. Rep. 137.

Decided April 21, 1898.

HOMICIDE: *Several dying declarations—Impeachment of same—Same not to be taken into jury room—Judge acting as examiner of witnesses—Exclusion of evidence—Remarks by the court—Instructions.*

1. Where a dying declaration is reduced to writing and signed by the declarant, the writing is the best evidence of such declaration; but the fact that a dying declaration has been reduced to writing does not preclude evidence of oral dying declarations made at other times.
2. In criminal prosecutions the People are not restricted to proof of a single dying declaration, but such declarations, if otherwise admissible, may be proved as made from time to time.
3. Section 55 of the Practice Act (Rev. Stats. 1874, p. 781), which provides that papers read in evidence, other than depositions, may be taken by the jury upon retirement, is applicable to civil cases only.
4. The mode of procedure in criminal prosecutions is governed by division 13 of the Criminal Code, section 8 of which provides

- that trials for criminal offenses shall be conducted as at common law, except as otherwise provided by the Code.
5. Following the common-law rule, the jury, in criminal cases, may, upon retirement, take such books and papers which have been produced in evidence as the trial judge, in the exercise of sound discretion, shall direct.
 6. Permitting the jury, upon retirement, to take a written dying declaration against the defendant is an abuse of the trial court's discretion, where the defendant's evidence was oral only, and contradictory of the declaration, which constituted the principal evidence against him, and where the declaration contained passages in brackets which the court has ruled as inadmissible, though the jury were orally directed not to consider them.
 7. A dying declaration against a defendant indicted for furnishing a drug to the deceased to produce an abortion may be impeached by contradictory statements, made by the deceased either before or after the abortion, even though such contradictory statements were not made *in extremis*.
 8. Though within the power of the trial judge, in criminal cases, to propound pertinent and properly framed questions to a witness, yet the examination of witnesses is the more appropriate function of counsel, and instances are rare and the conditions exceptional which will justify the trial judge in conducting an extended examination of a witness, and a sound discretion will seldom deem such course advisable.
 9. The action of the trial court in propounding questions to witnesses will not be reviewed on appeal, nor the record consulted to determine whether such questions were leading or suggestive, where the objections by counsel fail to specify the grounds thereof, being merely general in character.
 10. Instructions which take from the jury the controverted question whether the accused furnished a certa. drug to the deceased which produced an abortion resulting in her death, as charged by her dying declaration, and which invite them to find the accused guilty although they believe some other person committed the crime, provided they believe the accused advised or encouraged it, are prejudicial, where there is no evidence of the latter condition of affairs.

Writ of error to the Circuit Court of Pike County; the Hon. Jefferson Orr, Judge, presiding. Reversed.

W. E. Williams and W. H. Crow, for plaintiff in error.

William Mumford and Edwin Johnston, for the People.

Boggs, J. At the November term, 1896, of the Pike circuit court, an indictment was returned by the grand jury charging the plaintiff in error with the murder of one Alice Grimes. At the April term, 1897, of the said circuit court, the cause was

tried, and the plaintiff in error adjudged to be guilty of the charge alleged in the indictment, and his punishment fixed at confinement in the penitentiary for a term of fourteen years. This is a writ of error brought to reverse the judgment of conviction.

The theory of the prosecution was that the said Alice Grimes became pregnant with child, and that the plaintiff in error, with intent to produce a criminal abortion, supplied her with and induced her to take repeated large doses of calomel; that the effect of the administration of the said drug caused a miscarriage; and that said Alice Grimes died as the result thereof. The death of said Alice Grimes was fully proven. The evidence that calomel was furnished by the plaintiff in error to her consisted wholly of her dying declarations, nor was there any proof that he advised or counseled her to use calomel, other than such declarations. The proof as to her pregnancy and that an abortion was produced was her dying statements, together with proof of circumstances which the People insist are corroborative upon the point.

The circuit court ruled that the deceased was in such condition, physically and mentally, for a period of seven days prior to her death, that statements made by her were admissible in evidence as dying declarations. Witnesses were produced and allowed to testify to declarations made by her in their presence on four different days, and proof was also made that statements made by her on still another day were reduced to writing and signed by her, and this written statement was produced and read in evidence to the jury. The plaintiff in error objected to the admission of the oral dying declarations on the ground that where such declarations have been repeated at different times, and at one of which times such statements were reduced to writing, only the written statement is admissible in evidence. The court overruled the objection, and the plaintiff in error excepted, and now urges the ruling of the court as error. The rule, as we understand it to be, is, if the dying statements are reduced to writing and signed by the declarant, the writing is the best evidence of the statement made at that time, and must be produced or its absence accounted for, but that the fact that a declaration has been reduced to writing will not preclude evi-

dence of unwritten declarations made on other occasions. Wharton on Crim. Evidence, sec. 295; Bishop on Crim. Pros., sec. 1213; Hochheimer on Crimes, sec. 184; McClain on Crim. Law, sec. 429, and authorities cited in note g.

Nor is the contention of the plaintiff in error tenable that the People are restricted to proof of the declarations made on one occasion only. Such statements, if otherwise admissible, may be proven as made from time to time.

When the jury retired to consider of their verdict, the court, over the objections of the plaintiff in error, permitted the jury to take the written dying declarations into the jury room for their consideration, and this action of the court is urged as error. Section 55 of the practice act (Rev. Stat. 1874, p. 781), which provides that papers read in evidence, other than depositions, may be taken by the jury upon their retirement, is applicable only to civil cases. The mode of procedure to be observed in the trial of criminal cases is governed by the provisions of division 13 of the Criminal Code (Rev. Stat., p. 409). The eighth section of the division (1 Starr & Curtis' Stat. 1896, par. 612, p. 1400) provides that all trials for criminal offenses shall be conducted according to the course of the common law, except when the Criminal Code points out a different mode. Nothing in the said division of the Criminal Code purports to direct what shall be taken by the jury from the bar of the court. The common-law rule in criminal cases was that the jury, when they retired to deliberate on their verdict, should take with them such books and papers which had been produced in evidence as the judge presiding should direct. 1 Bishop on Crim. Proc. (3d ed.), sec. 982a; Hochheimer on Crimes, sec. 250. Whether a writing introduced in evidence in a criminal case should be delivered to the jury to be consulted by them in the jury room, rests in the sound discretion and judgment of the court, and it is therefore not error to permit a jury to take a written statement, unless the reviewing court can say that such course was prejudicial to the defendant, and ought not, in the exercise of sound discretion and judgment, have been pursued. The written statement in question assimilated so nearly to a deposition that all of the reasons which have by text-writers and courts been advanced in support of the view that depositions should not be

taken by a jury in their retirement may well be invoked as reasons why this statement should not have been allowed to go into the jury room.

In *Rawson v. Curtiss*, 19 Ill. 456 (which was decided prior to the enactment of the section of the practice act which excludes depositions from the jury when in their retirement), Mr. Justice Breese, after forcibly stating the injustice of allowing written testimony to be taken into the jury room, declared that the practice of permitting depositions to be taken out by the jury, either with or without the direction of the court, was wrong in practice and should be abolished. This remark of the court applies with greater force to dying declarations than to depositions, regularly and lawfully taken; because, when a deposition is taken, ample opportunity is given the adverse party to appear and cross-examine the witness, and thereby expose any errors, bring out suppressed facts which would weaken or qualify the statement, test the truthfulness, recollection, and fairness of the witness, and aid to determine as to the truth of his statements, while no such opportunity is permitted when a dying declaration is reduced to writing. In the case at bar, dying declarations of the deceased, made on four occasions other than when the written statement was signed, were reproduced by witnesses for the State before the jury. The written statement was read in their hearing. They heard no evidence on the part of the plaintiff in error except such as was testified to by witnesses in their presence, and the testimony so produced in behalf of the plaintiff in error was in direct conflict with material portions of the dying declarations. To deliver the written statement to the jury so they might have it constantly before them during their deliberations, to operate on their sympathies as well as their memory, tended to give a manifest advantage to the People over the plaintiff in error, whose proof was but oral. No reason is suggested, nor is any perceived, why the one party should have thus been given an advantage over the other.

The circuit court ruled that certain portions of the written statement were not admissible in evidence and not competent for the jury to consider, and ordered these portions to be marked, and orally announced the jury should not consider such marked phrases. It appears from the record these in-

competent phrases or words were marked by being inclosed with brackets. A similar course was pursued with reference to depositions which the court permitted the jury to take with them in their retirement in the case of *Rawson v. Curtiss, supra*, and in the course of the criticism upon such practice this court said (page 481): "The jury may or may not have disregarded the marked portions. This cannot be known certainly, as there is no proof to the point, but it is certainly apparent that they had no other instructions. They were not told, in express terms, to disregard them. Even had they been thus told, such is our nature that by the very command not to regard them curiosity would be aroused to know what they were; what secret it is the court designs to hide from them; what tree of knowledge of good and evil, the fruit of which is forbidden to us, and, like their first parents in God's own garden planted for them, they would pluck and eat. It is human nature, and mountains of instructions could not crush it out. Reading and pondering these rejected portions, and reasoning with one another why they should have been excluded, their minds would naturally be impressed by them, and they unconsciously form conclusions from the rejected evidence. Few know the secret and insidious manner by which impressions are made on the mind, or how slight the operating cause may be." We think that a sound discriminating discretion was not exercised in the matter of permitting the written statement to be taken by the jury when they retired to consider, weigh, and determine the testimony.

The case as relied upon by the People, the proof thereof being the dying declarations aforesaid, was that the plaintiff in error, late in the afternoon on the 2d day of July, 1896, gave to the deceased a quantity of calomel, and directed her to take the same for the purpose of procuring an abortion; that she took two doses of the calomel on the same day. That an abortion occurred on the 19th day of July is claimed to have been established by the dying statements of the deceased and other testimony in corroboration upon that point. The plaintiff in error was produced as a witness in his own behalf, and among other things testified that he had a conversation with the deceased on the 11th day of July, 1896, in front of a barber shop in the village of Nebo, and a second conversation at his store in the

village on the 20th day of the same month, and his counsel propounded to him certain questions for the purpose of bringing out statements and declarations which he alleged the deceased made to him during said conversations contradictory to material portions of the alleged dying declarations. The court ruled such declarations were not admissible in evidence, and in so ruling made, in the hearing and presence of the jury, the following remarks: "That is not only objectionable, but it ought not to be repeated before the jury. Such evidence won't do. If conversations conceived in the fertile mind of a defendant can be admitted when the woman is dead and cannot refute it, it would render convictions in this class of cases impossible." Counsel for plaintiff in error objected and excepted to the ruling and remarks of the court. It is well settled that dying declarations may be impeached by proof of contradictory statements on material points, though such contradictory statements were not made *in extremis*. Bishop on Crim. Proc., sec. 1209; Wharton on Crim. Evidence, sec. 298; McClain on Crim. Law, sec. 431; Hochheimer on Crimes, 184.

After the evidence for the plaintiff in error (the defendant below) had been submitted and the rebuttal evidence for the People introduced, the court announced that the plaintiff in error might be recalled and allowed to testify as to the statements of the said deceased in front of the barber shop on the 11th day of July, and that conversation was testified to, but the court again refused to allow the plaintiff in error to introduce testimony as to the statements of the deceased in the store on the 20th day of July.

When the question as to the admissibility of the alleged statements of the deceased to the plaintiff on the 20th day of July was before the court, but after the court had made the remark thereinbefore set out, it was ordered that the jury be withdrawn, and the plaintiff in error, in the absence of the jury, detailed to the court the conversation which he alleged occurred between himself and the said deceased in his store while other parties, namely, Asa Gheen and Mrs. Pinkerton, were in the store. As to that the plaintiff in error testified as follows:

"The court: What did you say she said to you on the 20th of July?

"A. She came up to the store, and she said, 'I am as independent now as you are.' I said, 'I thought you was always as independent as I was.' She said, 'I miscarried this morning.' I said, 'Yes; I expect you did.' She said, 'I did.' I said, 'I guess you didn't, did you?' She said, 'Yes; I did.' I said, 'Alice, I know better than that; I know you wouldn't be out here in this mud and wet and rain if you had done anything of that kind.' She said, 'Well, I did.' I said, 'My Lord! girl, ain't you got more sense than that?' She said, 'Oh! it won't hurt me.' I said, 'It will.' Then she wanted to know if I wouldn't take her home after lodge. I said, 'No; I wouldn't go that night for five dollars, the kind of a night it was.' She said, 'You would if Maude Smith or Mollie Johnson wanted you to.' She said, 'I told you all the time I was in a family way, and you wouldn't believe it.' I said, 'Alice, if you are telling me the truth, for God's sake go and see a doctor and go home.' She said, 'There is nothing the matter with me now, only falling of the womb.' I told her to go and see a doctor, and she said, 'No.' I said, 'You will kill yourself in this rain.' Just at that time Dr. Pollock stepped in the drug store with a chair.

"Q. What was said in the store while Asa Gheen and Mrs. Pinkerton was there?

"A. She said to me, 'You don't care anything for me,' or something of that kind. I said, 'Why, certainly I do.' She said, 'Why don't you take me home?' I said, 'Alice, if you don't quit going with Babe Graham I won't have anything to do with you.' She said, 'Babe Graham is a devilish sight better than you are.' She said, 'When I was in trouble you were not willing to help me, and Babe Graham did.' I said, 'How did that come?' She said, 'When I was in trouble you would not help me.' I said, 'Alice, what is the use of saying that? Did I not offer you the money to go wherever you wanted to?' She said, 'You know I could not go away, and would not have offered me the money if you thought I would.'"

These alleged statements of the deceased, if true, were inconsistent with the alleged dying declarations in more than one material point. It was fairly to be inferred from the statements so testified to by the plaintiff in error that the abortion, if any

occurred, was produced without the knowledge or participation of the plaintiff in error, and that one Babe Graham was the person who assisted and participated in effecting the abortion.

The argument of counsel for defendant in error is that the conversation in question was properly excluded because (1) it was had after the abortion; and (2) that the alleged statement of the deceased that Babe Graham helped her out of her trouble may have had reference to some other trouble not connected with her pregnancy. We know of no rule restricting the plaintiff in error to the proof of contradictory statements made prior to the abortion, nor do we perceive any reason for the adoption of such a rule. The other objections to the admission of the statements must be overruled for the reason the evidence tended to show the "trouble" referred to was the alleged abortion, and it became thereupon the duty of the court to permit the jury to receive and consider the testimony. It was error to refuse to allow plaintiff in error to introduce proof of the excluded alleged statements.

The expressions of the court in ruling that such evidence should be excluded are also assigned as prejudicial error by the plaintiff in error; and in this same connection we may consider the complaints of the plaintiff in error that the court improperly undertook to examine and cross-examine different witnesses presented by the respective parties, and asked improper and leading questions of such witnesses. The court propounded a number of interrogatories to Malissa Grimes, the mother of the deceased, and to Mrs. Couch, in the examination of said witnesses in chief for the People, and in the redirect examination of Mrs. Grimes, and to the plaintiff in error upon cross-examination. The plaintiff in error objected to thirteen of the questions so framed by the court, and, the objections being overruled, preserved exceptions. The court determined it was admissible to prove certain declarations of the deceased as dying declarations, and Mrs. Grimes and Mrs. Couch were introduced as witnesses to detail such declarations. During the course of their examination upon this subject the court propounded to them a number of questions which counsel for plaintiff in error objected and excepted to, and in his brief argues were objectionable on the alleged ground they were leading and suggestive. The court

also propounded a number of questions to the plaintiff in error on cross-examination. The ground of the objections and the exceptions to these questions do not appear from the bill of exceptions, but the argument of counsel for plaintiff in error in support of the objections is, "the questions were leading, and that the tone and manner of the court when making the interrogations to all the witnesses was prejudicial, and the course pursued by the court in examining at length so many witnesses was unusual and tended to the injury of his cause."

It is within the power of the court to propound pertinent and properly framed questions to a witness. The exercise of the power, if the questions propounded by the court are directed to crucial points of the case, is most likely to arouse the serious apprehension of the one or the other of the parties, and certainly places counsel in a situation of great embarrassment if they conceive a question asked by the court is leading and suggestive in form or improper for any cause. It is a task of great delicacy and much difficulty for a presiding judge to so conduct the examination of a witness that nothing, in either the tone or inflection of the voice, the play of the features, the manner of propounding or framing the question, or the course of investigation pursued in the examination, will indicate to the jury the trend of the mind of the questioner. An extended examination of a witness by the court must be unfair unless it partakes partly of the nature of a cross-examination, and, though great skill and tact and perfect fairness be employed, there is much danger the impression or opinion of the court as to the truthfulness, candor, and reliability of the witness and as to the weight and value of his testimony will be manifested to the jury. Though at times the court may, by an opportune and carefully considered question, elucidate a point, aid an embarrassed witness, or facilitate the progress of a trial without in any degree influencing the jury or arousing distrust in the minds of the parties or their attorneys, yet the examination of witnesses is the more appropriate function of counsel, and it is believed the instances are rare and the conditions exceptional in a high degree which will justify the presiding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action

necessary or advisable. We must, however, decline to consult the record or consider the form of the questions excepted to in order to determine whether they are leading or suggestive, as claimed, for the reason the objections made to the questions did not specify the grounds thereof, being only general in character.

The observation of the judge made in the presence and hearing of the jury when ruling that it was not competent to permit the plaintiff in error to testify to conversations alleged to have been had with the deceased, in which plaintiff in error contended that the deceased made statements contradictory to the alleged dying statements, was manifestly prejudicial to the cause of the plaintiff in error. The jury could but imply from the remarks of the court that it was the opinion of the court the testimony of the plaintiff in error (which was afterwards admitted) that the deceased had made such alleged statements in a conversation with him were but the conceptions of the fertile mind of the plaintiff in error, and consequently had no basis in truth or in fact, and it may well be feared the jury would further imply that in the opinion of the court the plaintiff in error was presenting a fabricated defense throughout. The plaintiff in error was a competent witness, and the jury were the sole judges of the weight and credit which ought to be given to his testimony. He was entitled to a decision by the jury on the facts, uninfluenced by the opinion of the judge. In *Andreas v. Ketcham*, 77 Ill. 377, we said (page 379): "The opinion of the judge, given, as it was, before the jury, upon a question of fact which was controverted, could not do otherwise than prejudice the jury against appellants. The laws guaranty to all a fair and impartial trial, and courts are organized for the purpose of seeing that the laws are administered in such a manner that justice will be done to all. In cases where the jury have the sole power to determine questions of fact from the evidence, the law cannot be properly administered and justice done parties in litigation if the judge presiding, after the evidence is closed, gives to the jury his own opinion on a question of fact."

We think the court erred also in its rulings upon the instructions asked and given on behalf of the People. The indictment contained five counts. The charge in the first and third is that

the abortion and death were produced by the use of calomel, and in the second and fourth it is alleged that a noxious drug, the name whereof was unknown to the jurors, was used, and the charge of the fifth count is that the abortion was accomplished "by divers means then and there by the said James A. Dunn used and employed, the name and character of which divers means are to the jurors unknown." There was no proof tending to show any drug other than calomel was used. The only proof that plaintiff in error furnished calomel to the deceased consisted, as we have hereinbefore said, of the alleged dying declaration of the deceased. The plaintiff in error was engaged in business as a retail merchant in the village of Nebo, and in connection therewith drove a trading or huckster's wagon through the country in the vicinity of Nebo at regular intervals. The deceased had her home with her mother, about three miles east of Nebo. Her dying declarations were that plaintiff in error, while on one of his trading trips on the 2d day of July, 1896, late in the afternoon of that day, stopped at a gate which led from the public road to the home of the deceased, and then and there gave her a package of calomel, and directed her to take it in certain specified doses, and assured her it would produce a miscarriage; that she took the drug as directed; and that an abortion and her fatal illness followed. There was no proof, nor any attempt to prove, that the plaintiff in error used or attempted to use any other drug than calomel, or that he furnished any calomel at any other time or place than on the afternoon of the said 2d day of July in the public road near the said gate, and there was no proof whatever that he endeavored to accomplish the abortion by any other means, of any nature or character, other than by the alleged use of said calomel, or that he in any other way than that aided, advised, or encouraged the said deceased to bring about the miscarriage.

The plaintiff in error testified that when making the said trading trip on the said 2d day of July he passed along the public road and by the said gate about ten o'clock in the morning, and that he did not see or speak to the said deceased, and did not, on that or any other day, furnish any calomel to her; that he was accompanied on the said 2d day of July, while passing along said road and by said gate, by one Miss Maude Smith;

and that they drove along said public road to his place of business, in the town of Nebo, and that he remained in his place of business and said village of Nebo during the remainder of that day and all of the evening of that day. The said Miss Smith was produced as a witness and her testimony fully corroborated that of the plaintiff in error. In addition to this, Van Pinkerton and Mrs. Van Pinkerton testified that Miss Maude Smith accompanied plaintiff in error on that trip, and that they both returned to the store at Nebo from the said trading trip, on the said 2d day of July, about the hour of twelve on that day, and that the plaintiff in error remained at his home and in the store the remainder of the afternoon and evening of that day. In rebuttal the People produced John and Lawrence Springer and Alfonso Couch, who testified they saw the plaintiff in error driving his trading wagon on the public road in front of the gate which led to the home of the deceased, on the said 2d day of July, and that he stopped at the gate, and there met the deceased, and that plaintiff in error and the deceased engaged in a conversation there, and that plaintiff in error remained there for about forty minutes. This conflict of testimony presented to the jury for their determination a question of fact materially affecting the guilt or innocence of the accused. It was essential to the conviction of the plaintiff in error, as the case was presented by the evidence, the jury should find the plaintiff in error supplied the deceased with calomel, as she in her dying declarations declared he had done, and that her death resulted from the use of that drug. The record is barren of proof tending to show that plaintiff in error contributed to her death by any other manner or means or otherwise aided or abetted therein, yet the court gave to the jury the following instructions:

"(27) Even though you may believe from the evidence that the defendant did not, by his own hand and act, produce the abortion charged, if you believe, from the evidence, beyond a reasonable doubt, that the same was so produced as charged in the indictment, yet if you do believe from the evidence, beyond a reasonable doubt, that the same was committed by some person in manner and form as charged in the indictment, and if you further believe from the evidence, beyond a reasonable

doubt, that the person so committing it (if the evidence so shows, beyond a reasonable doubt, whether it was Cora Alice Grimes herself or another) was advised, encouraged, and induced by the defendant to so commit it, and if you further believe from the evidence, beyond a reasonable doubt, that the death of Cora Alice Grimes was thereby occasioned and caused as charged in the indictment, then, if you find the facts as last above stated, it would be your duty to find the defendant guilty."

"(45) If you believe from the evidence, beyond a reasonable doubt, that the defendant did, in manner and form as charged, either by word, act, gesture, sign, or otherwise, intentionally cause or induce, aid, advise, or encourage said Cora Alice Grimes to produce the abortion in manner and form as charged in the indictment, and that such abortion, if the evidence shows it beyond a reasonable doubt, resulted in and caused the death of Cora Alice Grimes, in manner and form as charged, you should find the defendant guilty."

The effect of these instructions was to relieve the jury from the difficult task of determining the truth as to the controverted question whether the plaintiff in error supplied the deceased with calomel, and thus brought about the miscarriage and her subsequent death, and to invite them to return a verdict finding the plaintiff in error guilty though they were unable to determine whether he supplied her with calomel, and, even if they believed some person other than the plaintiff in error "committed" the abortion by any means, if, upon a general view of the whole case, the jury entertained the belief that the plaintiff in error had advised, encouraged, or aided and abetted the perpetration of the alleged crime. When it is remembered there was evidence tending to show the plaintiff in error had had sexual intercourse with the deceased, and tending to show she became pregnant and aborted the fœtus, the vice of these instructions becomes manifest. They might well be understood by the jury to suggest that suspicions which naturally arise from proof of the existence of a motive to commit the crime would justify the conclusion the party having such motive had by some "word, act, gesture, sign," or in some other manner, aided or abetted in the perpetration of the offense.

Plaintiff in error has assigned, and his counsel in their brief have argued, other alleged errors, but it does not seem necessary we should extend this opinion by reference thereto. For the reasons indicated we think the plaintiff in error did not have that fair and impartial trial to which he was entitled by the law of the land. The judgment of conviction is reversed, and the cause remanded. Reversed and remanded.

GRIFFIN v. STATE.

40 Tex. Crim. Rep. 312—50 S. W. Rep. 366.

Decided March 15, 1899.

HOMICIDE: Declarations part of res gesta—Improper questions—Instructions—Weapon.

1. The proximate cause of death being a blow on the head, it is immaterial that death would probably not have ensued had not deceased's brain been inflamed from the use of intoxicating liquor.
2. Expressions of regret, with surprise at the result of the fatal blow, made by defendant within a few minutes after the blow, before the defendant had left the scene and while still under excitement, are part of the *res gesta*, and should have been admitted in evidence.
3. The error in excluding such testimony was not cured by a similar expression from the defendant while on the witness stand.
4. It is improper, although not always reversible error, for the prosecuting attorney to ask manifestly irrelevant questions.
5. Where from the evidence it appeared that the homicide was the result of a sudden difficulty, in which the deceased was aggressive, and in which the fatal blow was struck with an article, in its ordinary use, not deadly, it is error to charge the jury that "Where the circumstances attending a homicide show evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts in the case, though the instrument or means used may not, in their nature, be such as to produce death ordinarily;" but the court should have charged that, if the jury believe that the weapon used was not likely to produce death, they could not presume that death was designed.

Appeal from the Victoria County District Court; Hon. James C. Wilson, Judge.

John Griffin, convicted of murder in the second degree, appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of six years, and he appeals.

The homicide occurred a few miles from the town of Victoria, at the saloon of Otto Ficks. It does not appear that there was any former grudge between the parties, and the meeting at this saloon was casual. A few weeks before the difficulty, deceased, Mauritz Hanboldt, lost his hat, and appellant found it. When they met in the saloon of Ficks, appellant asked deceased to give him a beer for finding his hat. Deceased informed him that he had already given a beer for that, and declined to give him another. The State's witnesses show that appellant immediately became boisterous, and used profane and abusive language. Defendant's witnesses, however, deny this. All agree that he immediately returned from the table where deceased was sitting, with another person, to the bar counter of the saloon, to drink a glass of beer. Deceased got up, and told appellant, "to come here; he wanted to tell him something." Appellant came to him, and deceased took hold of him, and led him towards the door of the saloon, and appellant asked him what he wanted. He told him he wanted to show him something. Appellant appears to have pulled himself loose from deceased. Deceased, who was some stouter and heavier than appellant, then appears to have gotten in behind appellant; and, according to appellant's witnesses, shoved and kicked him out of the saloon door, deceased having his glass of beer in his hand. Some of the State's witnesses say that they did not see this. Deceased's wife, who was on the outside, and a few yards from the saloon, sitting in a buggy, waiting for her husband, states that after appellant got out of the saloon she saw him pour the beer out of his glass, and then turned, and threw it. Other witnesses testify that the beer was not poured out of the glass, but the glass was thrown with the beer in it. It struck deceased in the head, a little above the left ear, and he fell on the saloon floor. In a short time he struggled to his feet, ran out of the saloon into a little field near by, was caught by his friends, and brought back, placed in the buggy, and carried to the house of Ficks, where he died, from the effects of the wound, about twelve or one o'clock that night. Appellant, after he struck de-

ceased, returned to the saloon; and there is some controversy as to whether he attempted again to assault deceased, some of the witnesses testifying that he did and others that he did not. He picked up some small weights that were near by, and went out of the saloon at another door, and in a short time went to a wagon near the saloon, and, with other parties, left. He surrendered to the sheriff the next day. We would observe that the witnesses who describe the wound state that there was no blood or break of the outer skin; that the wound showed in the shape of a half circle, as if inflicted with the bottom of a beer glass. The skull was not exposed, but from a superficial examination of the wound the physicians testified that the skull was fractured, and that the blow caused the death of deceased.

Appellant proposed to prove that deceased was addicted to the excessive use of alcoholic liquors, and was beastly and helplessly drunk two days before the killing. He states that this evidence was offered for the purpose and as preliminary to the testimony of Dr. Rape, who attended the deceased at the time of his death; and that he proposed to prove by him that, but for the inflamed condition of the brain, the blow inflicted would not have caused the death of deceased. The court explains this by stating that Dr. Rape testified in the case, and did not testify as stated in the bill of exceptions. The testimony, as offered, was excluded. In this we see no error. Even if the testimony of Dr. Rape had been to the effect that, but for the diseased condition of the brain, death might not have resulted from the blow, still there would have been no error in rejecting said testimony. The blow was the proximate cause of the death of deceased, and the enfeebled condition of deceased at the time would not be material. There was no suggestion here of any gross negligence on the part of deceased after receiving the blow, or of his attendants.

Appellant offered to prove by Wes Brown and Matthew Wyatt, who were present at the homicide, that they were at the wagon in which defendant and themselves left the scene of the difficulty; that, immediately upon defendant leaving the house where the blow was struck, he came to the wagon, and said to them: "I hope I haven't hurt him much. I did not think the glass was heavy enough to knock him down. I just wanted to

keep him from kicking me any more." This was within five or six minutes after the blow had been struck, and while defendant was still very much excited and frightened from the difficulty, and while the people in the house were surrounding deceased. The State objected to this, because it was not *res gestæ*, but merely self-serving. The court, in his explanation to this bill, in refusing to admit the testimony, states that the declaration of defendant was made five or ten minutes after the difficulty, and after defendant had walked from the house to the wagon in the road, and after the wagon had been driven thirty or forty yards. Defendant and Wes Brown got into the wagon with the witness Matthew Wyatt, and that it was ten or fifteen minutes after the difficulty when defendant made said statement. Appellant further proposed to prove by himself the same expressions in regard to the difficulty as above set out, and that he was at the time very much excited and frightened from the difficulty, and that the wagon was not more than thirty feet from the house; and these were the first people he had mentioned the matter to; that this was about five minutes, or less, after the blow had been struck. This was objected to on the same ground, and the court appended to this bill no explanation. We are inclined to the view that this testimony was *res gestæ*, and was admissible as such. In point of time it was very close to the difficulty. Appellant does not appear to have been engaged in any other matter, nor to have indulged in any conversation about any other subject. Almost immediately after the fatal blow was struck by him, and while he was still excited, before he left the place, he made the statement which was excluded. It does not occur to us that there was time for fabrication, nor is there any circumstance indicating that the statement was not the spontaneous expression of the witness (defendant), springing out of the transaction. *Smith v. State*, 21 Tex. Crim. App. 277, 17 S. W. Rep. 471; *Fulcher v. State*, 28 Tex. Crim. App. 465, 13 S. W. Rep. 758; *Chalk v. State*, 35 Tex. Crim. Rep. 116, 32 S. W. Rep. 534; Underh. Crim. Ev., § 95 *et seq.* True, appellant, in his testimony, stated these facts, but his evidence on this point was not given in as *res gestæ*, but the mere statement of the fact, long after the homicide, after time for deliberation; and, of course, such testimony would not

have the same force and effect with the jury as if it was a part and parcel of the transaction, springing out of it at the time. It appears a small matter that he was deprived of this testimony, yet it was a right to which he was entitled; and we cannot tell what effect its admission may have had with the jury.

Appellant, by his bill of exceptions No. 5, questions the action of the court permitting the district attorney to ask certain questions, suggesting that one Frank Jones had robbed deceased a short while before the homicide, and that said Jones was a cousin of defendant. This testimony was not admitted by the court, but the complaint is that the asking of the question, under the circumstances, was calculated to injuriously affect the defendant with the jury. We believe that the testimony was clearly inadmissible, and that the questions calculated to elicit it were obviously improper, and should not have been asked. While this is true, we would not be willing to reverse the judgment alone on this ground.

Appellant excepted to the action of the court in giving the following charge: "Where the circumstances attending the homicide show evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts of the case, though the instrument or means used may not, in their nature, be such as to produce death ordinarily." This was objected to, and the charge was also objected to because the court erred in not charging the jury fully on the question of his intent to kill deceased. We do not see, in this case, any evidence that the homicide was inflicted in a cruel manner, or under circumstances showing an evil or cruel disposition. It was a sudden quarrel, in which it appears that deceased struck the first blow. He shoved and kicked defendant out of the saloon. The defendant immediately turned, and threw a beer glass, which he had in his hand, at the deceased, striking him on the head, inflicting a wound from which he died. This was what occurred, and we fail to see in the testimony any evidence indicating an evil or cruel disposition, unless any killing which may occur in a casual difficulty indicates such cruel or evil disposition. We do not believe the court should have charged on this subject. The real keynote in this case was appellant's intention to kill. The court

gave in charge to the jury article 717, Penal Code, on this subject, but we believe the learned judge should have proceeded further than merely to give the statute in the abstract form, and should have applied the law embodied in such statute to the facts of this case, and instructed the jury pointedly that, if they believed the weapon used was not likely to produce death, the jury could not presume that death was designed; and that, before they could convict appellant of either murder or manslaughter, they must believe, from the manner in which said weapon was used, it was evidently intended by appellant to take the life of deceased. *Shaw v. State*, 34 Tex. Crim. Rep. 435, 31 S. W. Rep. 361; *Honeywell v. State*, ante, p. 199. We furthermore believe that the court's charge on manslaughter should have been directly addressed to the facts proved. The statute makes an assault inflicting pain or bloodshed adequate cause. The evidence here showed that deceased did assault appellant by shoving and kicking him out of the saloon. The court charged generally that anything which was adequate cause to produce anger, etc., was adequate cause; but the salient fact in this case suggesting adequate cause, was the assault of deceased on appellant, and the court should have predicated a charge of manslaughter on the facts proved on this subject. For the errors discussed, the judgment is reversed, and the cause remanded.

DAVIDSON, P. J., absent.

STATE V. PRUDE.

76 Miss. 543—24 So. Rep. 871.

Decided January 23, 1899.

HOMICIDE: *Construction of statute—Unborn child.*

1. At common law an unborn child was not a subject of homicide.
2. An indictment, to come within the provisions of section 1157 of the Code of 1892, should show that the means used were such as are by that section declared unlawful.
3. Section 1157 of the Code of 1892 does not apply to an act done by the mother of an unborn child.

Appeal from the Circuit Court of Pontotoc County; Hon. Eugene O. Sykes, Judge.

Emma Prude was indicted, and, a demurrer to the indictment having been sustained, the State appeals. Affirmed.

(Copy of section 1157 of Code of 1892:) Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, and shall thereby destroy it, shall be guilty of manslaughter, unless the same shall have been necessary to preserve the life of the mother or shall have been advised by a physician to be necessary for such purpose.

Wiley N. Nash, Atty. Gen., for the State.

No appearance for the appellee.

TERRAL, J. The appellee was indicted for that she "did feloniously kill and slay an unborn quick child of said Emma Prude," etc. The defendant demurred to the indictment. The court sustained the demurrer and the State appeals.

This is not a good indictment at common law, for, by the common law, "An infant in the mother's womb, not being in *rerum natura*, is not considered as a person who can be killed within the description of murder, and, therefore, if a woman, being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter." 3 Russell on Crimes (International ed.), 6; Wharton on Hom. (2d ed.), sec. 303; Wharton's Am. Crim. Law (6th ed.), sec. 942; McClain on Crim. Law, sec. 294; *Abams v. Foshee*, 66 Am. Dec. 91, note.

The indictment, obviously, is not drawn under § 1157, Code of 1892, because the administration of some medicine, drug or substance, or the use of some instrument, with intent to destroy the unborn quick child, is not alleged therein, and because the taking of any substance or the use of any instrument by the pregnant woman herself with intent to destroy the child in her womb is not conveyed by said section. Bishop on Stat. Cr. (2d ed.), secs. 747, 749. Affirmed.

COMMONWEALTH V. FARRELL.

187 Pa. St. 408—41 Atl. Rep. 382.

Decided October 17, 1898.

HOMICIDE: *Expert evidence—Former attempt and threats—Instructions—Private detective's interest—Weight of the evidence.*

1. Expert witnesses are those possessing knowledge, skill or experience needed to inform and guide the court and jury in the particular case; and the question being investigated should be one requiring the aid of such evidence.
2. Expert evidence not necessary to identify stitches in an old pocket-book as having been made by the same person who stitched up another old pocketbook.
3. An undertaker's assistant not competent as an expert witness as to when *rigor mortis* may have set in, especially when it did not appear that his attention had been specially directed in that line of observation.
4. Erroneous instruction, attaching too much importance to the evidence of an alleged accomplice in a prior attempt to rob deceased, and to threats; and, although the jury was advised not to be *unduly prejudiced* thereby, yet the tenor of the instruction was that such facts raised a probability of guilt.
5. Instruction erroneous, in apparently assuming the identity of the old pocketbook found six months after, from having been mended with a common brand of thread with which a pocketbook of the deceased was alleged to have been mended; which evidence, in the opinion of the court, was tinged with an air of both improbability and suspicion.
6. The defendant had the right to cross-examine a detective-witness of a detective agency as to the amounts and conditions of remuneration his agency was to receive from the county employing it,—whether it was working for a fixed price or a conditional one dependent upon conviction, and the like,—as having a bearing upon the interest, feeling, and credibility of the detectives in the matter, and it was error not to allow such cross-examination.

James Farrell, convicted of murder in the first degree, in court of O. & T. Blair county, appeals. Reversed.

R. A. Henderson, for the appellant.

William S. Hammond, District Attorney, for the Commonwealth.

WILLIAMS, J. The indictment in this case charges three persons with the crime of murder in the first degree, in the killing of one Henry Bonnecke. They are the defendant Frank

Wilson, and William Doran. Wilson and the defendant were separately tried, and Doran has so far escaped arrest. The trial of Wilson resulted in a conviction. A new trial was refused, and the case came into this court by appeal. At the March term, 1896, Farrell, the defendant, was tried and convicted. His application for a new trial was refused, and he also appealed. The two appeals were heard in this court at the same time, and the proceedings upon Wilson's appeal, with the opinion of this court, will be found reported in 186 Pa. St. 1, 40 Atl. Rep. 282. For a full statement of the circumstances surrounding the murder, of the preparation of the case of the Commonwealth by detectives, and the general questions affecting their credibility, reference is made to the case of *Commonwealth v. Wilson*, above cited. This appeal involves several questions not raised in that case, which we will briefly consider in what seems to be their natural order. The first of these is raised by the second, third, and fifth assignments of error, and relates to the admission of expert witnesses. Two things must concur to justify the admission of an expert witness: First, the subject under examination must be one that requires that the court and jury have the aid of knowledge or experience such as men not specially skilled do not have, and such, therefore, as cannot be obtained from ordinary witnesses; second, the witness called as an expert must possess the knowledge, skill, or experience needed to inform and guide the court and jury in the particular case. Upon such a question such a witness may be called, and may testify not merely to facts, but to his conclusions from the facts, because the court and jury are without the knowledge necessary to enable them to draw the conclusions for themselves without aid. In this case, an old pocketbook, which had been torn and mended with thread in a coarse and clumsy manner, had been put in evidence. Another pocketbook, said to have belonged to Bonnecke, which had been repaired by what seemed to be the same sort of thread, was put in evidence for the purpose of proving that the first pocketbook belonged to and had been repaired by Bonnecke. There was nothing peculiar about the first pocketbook, or the thread with which it had been mended, or the stitches taken upon it. We can see no question of art or skill raised here upon which special knowledge was

needed, nor did the witness show himself possessed of expert knowledge, if it had been necessary. The witness was competent, as any other witness would have been, to testify to any peculiar characteristics of the pocketbook, or the thread, or the stitches, and the jury could have compared them at their leisure, and determined the value of the evidence; but to dignify the testimony by treating it as that of an expert was to invite the jury to treat it as entitled to some superior consideration, such as the testimony of ordinary witnesses was not entitled to.

The question about the length of time after death when *rigor mortis* may be expected to set in was a question for expert medical testimony. Long experience and observation might stand in lieu of the study of books, and qualify one to speak as an expert upon this subject; but the witness called as an expert upon this question had no medical knowledge, had read nothing on the subject, and had no experience except as an undertaker's assistant in preparing dead bodies for burial. His attention as an undertaker does not seem to have been specially directed to this question, and he frankly stated that he was not an expert upon the particular subject.

The sixteenth assignment of error raises another question of the admissibility of evidence.

The Commonwealth made a written offer to prove by one Joseph Peddicord "that in 1894 the defendant, with Frank Wilson, William Doran, and the witness, had entered into a combination to rob Bonnecke; that in February, 1895, the defendant and the witness assaulted Bonnecke in his own house, and attempted to rob him, and that the same evening the defendant proposed to witness to renew the attack upon Bonnecke, and effect the robbery; that the witness declined, and thereupon the defendant swore that he would get Bonnecke's money, if he had to kill the old man to do so." This offer was limited to no particular purpose, but was made with the idea that it was evidence for the purpose of establishing the guilt of the defendant. It was objected to, and both its competency and the admissibility of the witness were denied. It must be remembered that Bonnecke was killed between the night of the 4th of April, 1895, and the morning of Sunday, the 7th. The defendant could not have reached Altoona earlier than about nine o'clock

on Saturday evening, the 6th of April. It cannot be said to be clear that he was there at all on that night. Our question, therefore, is, do the facts embodied in this offer tend to show that the defendant did participate on the night of the 6th of April in the robbery and murder of Bonnecke? A threat to rob would have been admissible to show knowledge or motive on the part of the defendant, but there is no legal presumption that such a threat will be executed, such as relieves the Commonwealth from the duty to prove the fact it alleges, viz. the participation of the defendant in the robbery and killing alleged. The court, however, not only admitted the offer as tending to prove the actual presence at the murder of the defendant, but drew the attention of the jury to it as evidence bearing upon this subject. The learned judge said in his charge: "The Commonwealth offered evidence which it is alleged points to the guilt of James Farrell, the defendant, and proves that he is the murderer, or one of the murderers, of Henry Bonnecke. Threats made by Farrell after his unsuccessful attempt to rob Bonnecke on February 21, 1895, as testified to by Joseph Peddicord, are relied on by the Commonwealth as part of such proof. In this connection, however, I would caution you not to attach undue importance to the fact that Farrell did attack Bonnecke on February 21, 1895. Such fact was properly admissible as part of the *res gestæ*, or surrounding circumstances of Peddicord's testimony, and as a circumstance which might point to the probability of Farrell's renewing the attempt; but you must not allow it to unduly prejudice you against the defendant." This was an instruction to the jury that the evidence of the attempted robbery, and the threat to renew it, had been properly received, and was to be considered as bearing upon the "probability of Farrell's renewing the attempt;" or, in other words, of his guilt of murder as charged in the indictment. The caution not to give "undue importance" to the facts set out in the offer, without some distinct statement of what this "undue importance" was, was of no value.

We come now to the question raised by the seventeenth assignment. The defendant was arrested at Allequippa, Beaver county, Pa., in November, 1895, some six months after the murder of Bonnecke. He was taken to Altoona, and two or

three days later one of the detectives procured a second warrant, returned to Allequippa, and with the aid of a local constable made search in the room and bed which had been occupied by Farrell while at Allequippa. The constable found an old, worthless pocketbook in the bed. This, it was alleged, had belonged to Bonneeke, been taken from him at the time of the murder, and kept concealed by Farrell for more than six months. This pocketbook had been torn, and rudely mended with thread of usual size and character. It was sought to connect this worthless pocketbook with Bonneeke by showing that he had a smaller pocketbook that had been mended in a similar manner. For this purpose a witness was put upon the stand as an expert to prove that the repairs upon each pocketbook had been made by the same person, with the same thread. The witness declined to say that the repairs on both were made by the same person. The thread used had been the same in number on both, as he thought, but it was a common number, and was not a certain basis for an opinion that the work had been done by the same person. This evidence was submitted to the jury in these words: "If the pocketbook in question, to wit, the pocketbook found in the bed at Allequippa, was the pocketbook of Henry Bonneeke, and was stolen at the time of his death in 1895, and was taken to Allequippa by Farrell, and was concealed in his bed, then there would be a strong presumption, arising from the possession of stolen property, that Farrell was the robber, or one of the robbers, who stole said pocketbook, and unfortunately it would strongly tend to show that he is guilty of being concerned in the death of Henry Bonneeke." The other side of this subject was presented thus: "On the contrary, if you have a reasonable doubt whether this pocketbook ever belonged to Henry Bonneeke, you should dismiss the circumstance of the mending of the pocketbook from the case, and allow it to have no weight against the defendant." The only consideration brought distinctly to the notice of the jury is the identity of the pocketbook brought from Allequippa as one of those which the murdered man owned and had in his possession at the time of his death. But suppose this be conceded; it by no means follows that the defendant either took it from the murdered man, or placed it where it was found. What motive had the

defendant, if he had been one of the murderers of Bonnecke, to keep this pocketbook? It was neither useful nor ornamental. Its possession could only be a source of constant danger. But, if he really did desire to keep it, why put it in his bed, when it would naturally be discovered every morning when his bed was made up for the day? It might have been put there in his absence. It might have been put there even after the search began. Which seems most probable,—that Farrell had kept this pocketbook for six months in his bed, or that it had found its way into the bed after his arrest? The credibility of this story was plainly for the jury, and they should first have determined its value.

In this connection the tenth assignment may be conveniently considered. The murder of Bonnecke occurred at a time when the attention of none of the surrounding citizens was attracted to it. The night when it was done was as wholly unknown as the persons by whom it was done. A detective was employed to investigate the case, and to try and bring the guilty ones to trial and conviction. This agency spent much time on the case, and it was by them that the arrest of the defendant was procured. The detective hunted up the evidence against him, or furnished it as the result of their interviews with him, or their investigations into his habits and surroundings. As tending to show their interest in the case, and to some extent affecting their credibility, they were asked upon cross-examination to state the general character of the contract with the county, and how their pay was to be adjusted. This was objected to, and excluded by the court. But why was it not competent? Whatever tends to show the interest or feeling of a witness in a cause is competent by way of cross-examination. If the witness had stated that his pay was conditional upon or was to be affected by the result of the trial, in any manner, it cannot be doubted that such a bargain would have shown just what his interest in the conviction of the defendant was, and been entirely proper for the jury to consider in determining his credibility. So, also, if he or his superiors had received a large sum from the county for services, and if they were really conducting the prosecution for the county, that fact could be shown upon cross-examination. It might not have been a very important fact, but it was

a competent one, upon cross-examination. There are other questions raised by the assignments of error that invite discussion, but their importance in this case is not such as to require it. Those we have considered are conclusive of this appeal, and require us to reverse the judgment appealed from, and award a new venire. Let an order be entered accordingly.

NOTE (by H. C. G.).—Mr. Rogers, in his work on Expert Testimony, section 1, defines thus: "An expert is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same. Strictly speaking, an expert in any science, art, or trade, is one who, by practice or observation, has become experienced thereon. An expert has been defined as 'a person of skill;' as a skilful or experienced person; a person having skill, experience or peculiar knowledge on certain subjects, or in certain professions; a scientific witness."

In *Chi., M. & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, it was said: "The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge."

In *Franklin F. Ins. Co. v. Gruver*, 100 Pa. St. 266, the court expressed surprise that a witness could be claimed to be an expert whose range of observation and knowledge was so general that it must be common to every person, and said: "The opinion of a witness who neither knows, nor can know, more about the subject-matter than the jury, and who must draw his conclusions from facts already in the possession of the jury, is not admissible."

SMITH V. STATE.

106 Ga. 673—32 S. E. Rep. 851.

Decided March 14, 1899.

HOMICIDE: Justifiable homicide—Voluntary manslaughter—Defense of habitation—Flight as evidence of guilt—Instructions.

1. The evidence did not warrant a charge of voluntary manslaughter.
2. The fact that one who has done an act which may amount to a crime immediately flees may always be given in evidence as tending to show guilt, but should be considered by the jury in connection with the motive that prompted it, and, at most, is only one of a series of circumstances from which guilt may be inferred.

3. The provisions of law relating to justifiable homicide, where the parties had been engaged in mutual combat, contained in section 73 of the Penal Code, were not applicable to the facts of this case.
4. When two or more persons manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another, for the purpose of assaulting or offering personal violence to any one being therein, and one of them, to prevent such entry, is killed by the occupant of the house, if the circumstances were sufficient to excite the fears of a reasonable man that such entry was intended, and the killing was done under the influence of such fears, such a homicide is justifiable, even though the assault or personal violence intended be less than a felony; and a charge that the assault intended must amount to a felony was error.

(Syllabus by the Court.)

Smith was convicted of voluntary manslaughter in the Gwinnett County Superior Court, Hutchins, Judge, and brings error. Reversed.

John R. Cooper, Oscar Brown and J. A. Perry, for the plaintiff in error.

C. H. Brand, Solicitor General, for the State.

LITTLE, J. The first two grounds of the motion for new trial are based on the allegations that the verdict is contrary to law, and without evidence to support it. Inasmuch as the case goes back for another trial, we do not pass upon the weight of the evidence in the case.

1. The next ground of error assigned is that the court erred in charging the jury the law in relation to voluntary manslaughter. We are of the opinion that, under the facts in this case, there was no evidence which authorized a charge on the law of voluntary manslaughter. We do not wish to be understood as saying that, if the circumstances were different, that is to say, if there was any proof, or a legitimate inference from the facts in evidence, that the plaintiff in error slew the deceased as the result of passion founded on sufficient provocation, found in the trespass of the deceased on the property of the accused, the offense of which he would be guilty would not be that of voluntary manslaughter. Every homicide committed as the result of passion is by no means to be classed as voluntary manslaughter. A homicide, when done in the absence of malice, and as

the result of a sudden heat of passion engendered by a provocation sufficient in law to justify the passion, is graded below the crime of murder, because the killing is then partially excused on account of the justly-aroused passion. Nor is it always necessary, in order to grade the offense as voluntary manslaughter, that there should be an assault upon the person killing, to justify the excitement of passion which induced the homicide. *Golden v. State*, 25 Ga. 532; *Stokes v. State*, 18 Ga. 17. Our Penal Code, § 65, declares that in all cases of voluntary manslaughter there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion. Assuming, as we must, under the evidence, that the deceased was a trespasser on the property of the accused at the time of the homicide, under the theory of the State he was a mere trespasser, without intending to injure the person or property. Under general criminal law, neither insulting nor abusive words or gestures, nor trespass, nor breach of contract, of themselves, amount to sufficient provocation for an act of resentment likely to endanger life. A mere trespass on property, less than that, to protect which, our Code makes it justifiable homicide to kill the trespasser, may be resisted by any reasonable or necessary force, short of taking or endangering life. Clark's Criminal Law, 145. If, in the course of a struggle to prevent such a trespass, by the use of reasonable and necessary force, which the owner is entitled to use, a struggle and combat ensue, then, whether the slayer is justified, or guilty of murder or voluntary manslaughter, is to be determined by other rules, not necessary here to be discussed. According to the evidence, there was no attempt to remove the trespasser; but the theory of the State is that the accused, with malice, or actuated by the spirit of revenge, deliberately shot the deceased while standing in the yard of the latter, when there was no necessity for him to do so to protect his habitation or family, and no circumstances at the time to justify a passion which caused him to shoot the deceased. The theory of the defendant was that he shot and killed the deceased to prevent him from entering his house, which he says the deceased was attempting to do, to commit an assault on

the person of his wife. The issue is a clearly-defined one. If the theory of the defendant be supported by the facts, he was not guilty of any offense, but was entirely justified. If the theory of the State be correct, then the crime was murder. Under the evidence, there seemed to have been a deliberate shooting on the part of the defendant, not as the result of passion, not in a struggle; nor was there any mutual combat, nor any evidence of an attempt by the slayer to remove the trespasser from his premises otherwise than by deliberately shooting him down. The evidence in this case is remarkable, not for what the witnesses who went to the house of the accused with the deceased say as to the facts of the homicide, but as to what they do not say; and, although three of them were present at the time on the premises of the accused, no clear account is rendered by any of them as to the facts of the homicide. But from the evidence of these witnesses, and circumstances shown by other witnesses, we fail to find any circumstances establishing the proposition that the shooting was the result of passion. This being true, a charge relating to voluntary manslaughter was error. Nor can a conviction for this offense stand, under the evidence disclosed in the record. *Dyal v. State*, 97 Ga. 428, 25 S. E. Rep. 319.

2. Another ground of the motion for new trial alleges that the court erred in charging on the subject of flight. The language of the court on this subject is as follows: "Something has been said upon the subject of flight. The rule on that subject is that where one commits an act that amounts presumptively to a crime, and the party who commits the act immediately flees from the processes and officers of the law, to avoid arrest or trial, the presumption would be authorized that he fled, from the consciousness of guilt. That presumption can be rebutted by showing that flight was not from a sense of conscious guilt, but for other reasons." It may be that the principle stated by the judge in his charge is a correct one, and if the propositions that the accused immediately flees from the processes and officers of the law, and that such flight was for the purpose of avoiding arrest or trial, be assumed, the conclusions which follow are legal and natural. But, whether so or not, the charge as to the law of presumptions which applies to the flight of one who is

charged with the commission of an offense, or has done an act which may amount to a crime, was too strongly put, and, without qualification, does not correctly lay down the principle applicable under the facts of this case. Mr. Wharton, in his work on Criminal Evidence, § 750, in treating this subject, says: "When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from a consciousness of guilt, and, though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred." And, further treating the subject, he also says: "The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say that escape, disguise, and similar acts, afford, in connection with other proof, the basis from which guilt may be inferred; but this should be qualified by a general statement of the countervailing considerations incidental to a comprehensive view of the question. Underhill, in his treatise on Criminal Evidence, § 119, citing 95 Mo. 623, 2 N. Y. Crim. Rep. 450, says: "It cannot with correctness be said that the flight or attempted flight of the accused before his arrest, taken alone, raises any legal presumption of guilt, or that his flight, without regard to the motive which prompted it, is, in law, evidence of guilt. At the most, it is only a circumstance, to be considered by the jury with the reasons that prompted it, tending to show guilt, or by which an inference of guilt may be raised, and it has no probative force unless it appears that the accused fled to avoid arrest or imprisonment." In the case of *Hickory v. United States*, 160 U. S. 408, 16 Sup. Ct. 327, it was ruled that the flight of the accused is a presumption of fact, not of law, and is merely a circumstance tending to increase the probability of the defendant's being the guilty person, which is to be weighed by the jury like any other evidentiary circumstance. See *People v. Wong Ah Ngow*, 54 Cal. 151; *S. C.*, 35 Am. Rep. 69. And such, also, is the ruling of our own court. *Jesse v. State*, 20 Ga. 156-166; *Smith v. State*, 63 Ga. 170; *Sewell v. State*, 76 Ga. 836. The judge in this case charged that the rule was, where one immediately flees to avoid arrest or trial, that the presump-

tion would be authorized that he fled, from the consciousness of guilt. This we think was not a fair presentation of the law of this case, for there was evidence tending to show the flight was not from the officers of the law, but to escape violence from the companions of the deceased; and the court made no qualification of its charge, appropriate to the evidence just mentioned. Flight is, at most, only a circumstance which may be weighed by the jury, in connection with other circumstances, to determine guilt, and is, of itself, no such circumstance as authorizes the jury to presume guilt.

3. Another ground of the motion for new trial is that the court erred in charging the jury the provisions of section 73 of the Penal Code, in relation to the homicide of a person where the killing must be done in order to save the life of the slayer. It must be apparent that the law of this section of the Code is wholly inapplicable to a case of this character. The provisions of this section apply only to cases of mutual combat, where one person endeavors, in good faith, to decline any further struggle. To such a person it is only justifiable to slay his adversary after a *bona fide* effort to avoid all further difficulty. *Powell v. State*, 101 Ga. 9, 29 S. E. Rep. 309. The slayer is protected only in cases in which the provisions of the section apply, when the killing was done as an absolute necessity to save his own life, and only in cases when it appears that the person killed was the assailant, or that the slayer had, in good faith, endeavored to decline any further struggle before he inflicted the mortal wound. There was no evidence of any mutual combat between the deceased and the accused preceding this homicide. On the contrary, the accused was in his house, and the deceased on his premises, without the house. There was no evidence of quarreling between them, nor of any attempt at flight; and the rules which determine the guilt or innocence of the defendant are not to be found in these provisions of law.

4. An exception is taken to the charge of the court which instructed the jury as follows: "If persons assemble before another's house, and actually advance on him, and render it necessary for his protection, or make such demonstrations as to excite the fears of a reasonable man that it was their intention to commit a felony on him or some member of his family, he

would be justified in shooting them; but, if they merely threaten to commit violence, he is not justifiable in shooting until he has warned them off." We do not think this is a fair presentation of the provisions of our law which afford protection to one who resists an invasion of the house in which he dwells. Section 70 of the Penal Code declares that it is justifiable homicide for one to kill a person who, in connection with another or others, manifestly intends and endeavors, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. It was held in the case of *Hudgins v. State*, 2 Ga. 173, that this provision of the Penal Code does not apply to a single individual, but contemplates the joint action of two or more persons, and that under this section the killing is justifiable when the assailant designed entering the habitation for the purpose of assaulting, or of offering any personal violence to, one of the inmates. So that this case establishes two propositions,—that under this provision of the Code it is justifiable homicide for one to kill another who, in company with some person or with other persons, intends and endeavors, in a riotous and tumultuous manner, to enter his habitation for the purpose of assaulting or offering personal violence to any person therein, and that it is not necessary, in order to justify, that such personal violence shall amount to a felony.

In the case of *Caldwell v. State*, 34 Ga. 10, where a number of persons went to the house of another, and endeavored, against the will of the owner, to force an entrance, and, having broken a window, one of them proceeded to enter the window, and was shot by the prosecutor in the act, this court held that a fair test whether the prosecutor was guilty of murder, or even of manslaughter, was whether the person killed was violently and unlawfully entering his dwelling. Again, under the provisions of section 72 of the Penal Code, if, after persuasion, remonstrance, or other gentle measure used, a forcible attack and invasion on the habitation of another cannot be prevented, it is justifiable homicide to kill the person so forcibly attacking and invading the habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue, to the

person, property, or family of the person killing. Under the provisions of these two sections of our Code, it must be apparent that the court erred in charging the jury as complained of. If, as a matter of fact, the evidence shows that more than one person, acting in concert and in the prosecution of a joint enterprise, went to the house of the plaintiff in error, then, whether the provisions of section 70 of the Penal Code, above referred to, would apply, depends entirely upon whether they, or one of them, in the prosecution of such common intent, manifestly intended and endeavored, in a riotous and tumultuous manner, to enter his house for the purpose of assaulting, or offering personal violence to, any person therein. Then, if the defendant shot and killed one of such persons so intending and endeavoring to enter, it would be justifiable homicide. If, however, only one of such persons made a forcible attack and attempt to invade the habitation, after persuasion, remonstrance, or other gentle measures, and such attack and invasion could not otherwise be prevented, it was justifiable homicide to kill the person so making the attack and invasion. And this is manifestly right. The law protects not only the person and the property of the citizen, but it protects his home, whether it be a hut or a palace; and he who seeks in a violent manner to enter that habitation, and will not heed the remonstrance or persuasion of the owner, but continues the attack and invasion, intending to do a serious injury, either to the person who resides there, to his house, or to some member of the family, forfeits his life; and he who, in good faith, under such circumstances, takes the life of the person so invading his home, is guiltless of crime, and is acting in the due protection of himself and his family. We do not say that the facts show that the plaintiff in error is thus protected, but these are the principles of law which, on his theory of the case, should have been given in charge to the jury; and the charge, as complained of, did not present, as we consider, the provisions of law which afford the slayer protection under the circumstances enumerated in the statute.

Other than as herein referred to, the court committed no error in its charge to the jury which calls for a reversal of its judgment. Judgment reversed. All the justices concurring.

PENNINGTON V. COMMONWEALTH.

21 Ky. Law Rep. 542—51 S. W. Rep. 818.

Decided June 17, 1899.

HOMICIDE: Resisting arrest—Duty of officer making arrest—Prejudicial evidence.

1. Where defendant is accused of killing an officer who was endeavoring to arrest him, but doing so without notice, the court should instruct the jury as to the law requiring the officer to give such notice.
2. It is error to permit the defendant to be cross-examined as to previous convictions and prosecutions not connected with the charge in the indictment.

Appeal from the Leslie County Circuit Court.

Pennington, convicted of murder, appeals. Reversed.

T. G. Lewis, Rader & Hanford, and Tinsley & Faulkner, for the appellant.

W. S. Taylor, for the Commonwealth.

HAZELRIGG, C. J. Appellant was indicted and convicted of the murder of Henty Coots in Leslie county, and from the verdict and the judgment sentencing him to the penitentiary for life has appealed to this court.

It appears that the accused had been confined in the Leslie county jail some months prior to the homicide on a felony charge,—obtaining a gun under false pretenses, it appears,—and had escaped jail. No warrant issued for his rearrest, so far as appears from any competent evidence; but a deputy constable and the deceased, with others, appear to have undertaken his rearrest, and had been looking for the accused in the neighborhood where he had been living for several weeks before the night of the killing. On the night of the killing, accused was at the house of two women, where he seems to have frequented, and was unaware of the proximity of the officer or his posse, as he was sitting by the fireside with a child in his lap, but with his gun in easy reach. Suddenly Turner, Coots, and some four others charged upon the house, guns and pistols in hand, and broke open the door, without warning or notice, and with their

guns presented. Two shots were fired almost simultaneously, and Coots fell mortally wounded. One of the shots was fired by accused, and the other by some one of the attacking party. The accused escaped, but was shortly afterwards arrested in Perry county. Turner had been an officer only a short while, having been appointed deputy constable by an order of the county court, as is now permitted by the statute; but there is no evidence conducing to show that the accused knew he was such a deputy. He did know, however, that Turner and Coots had been looking for him, and it is probable he knew that the attack was made by them or others for the purpose of accomplishing his arrest. The question of such knowledge on his part was substantially submitted to the jury in the instructions, although in an involved and indirect way; but, if he (we?) assume that he had such knowledge, still there is no instruction whatever limiting the force, or defining the manner in which the arrest might lawfully be made. The court instructed the jury that the officer and his force might break the door and use all necessary force to make the arrest, but there was no instruction that the attacking party were to give notice of their intention in making this sudden assault on the house, or that they were to use no more force than was necessary to make the arrest. In view of the manner of this attempted arrest, made in the nighttime, and without warning or notice, this limitation of the force to be used should have been defined in the instructions.

On the trial the following extract of the cross-examination of appellant is taken from the bill of evidence, to all of which evidence appellant objected: "Q. Were you indicted for anything since then? A. Yes, sir. Q. What was it? A. I was charged with killing a hog. Q. Were you convicted on that charge? A. Yes, sir. Q. Well, go on. Were you indicted for anything else? A. I was indicted here for taking a gun under false pretenses. Q. Were you indicted for anything in any other county? A. I was indicted once at Salysersville, Ky., for carrying concealed a pistol. I was tried and fined. Q. Were you ever convicted and sent to the penitentiary in any other State? A. No, sir." Then follow a number of questions as to whether the accused had ever been indicted in the counties of Knott,

Pike, Martin, Breathitt, Perry, and Bell; the witness answering in the negative to each question.

Our statute provides (sec. 597, Civil Code) that a witness may not be impeached by "evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment that he has been convicted of felony." It follows that the evidence quoted was incompetent, and from its nature it was presumably prejudicial. Such have been the repeated ruling of this and other courts. *Baker v. Commonwealth*, 20 Ky. Law Rep. 1778; *Martin v. Commonwealth*, 93 Ky. 193, 19 S. W. Rep. 580; *Leslie v. Commonwealth*, 19 Ky. Law Rep. 102; *Saylor v. Commonwealth*, 17 Ky. Law Rep. 103; Robertson's Kentucky Criminal Law and Procedure, vol. 2, sec. 979; *Commander v. State*, 60 Ala. 1; *Pinckard v. State*, 13 Tex. App. 478. The witness was also compelled to give, over his objections, the minute details of how he escaped from the jail of the county some months before the killing, and how, after his escape, he had by force taken a gun from the possession of the wife of one Wilson Baker, in Perry county.

There is other objectionable evidence of the same character, but the foregoing will serve to prevent its introduction on any future trial. For the reasons given, the judgment is reversed, with directions to award the accused a new trial, and for proceedings consistent with this opinion.

PEOPLE V. CARBONE.

156 N. Y. 413—51 N. E. Rep. 23.

Decided June 24, 1898.

HOMICIDE: *Two separate convictions of different persons for the same offense—Dying declaration—Inconclusive evidence.*

1. Where the evidence against the appellant did not preclude a reasonable doubt, and where, subsequent to his conviction, another person was convicted under another indictment for the same homicide, the court of appeals will, under its power conferred by section 528 of the Code of Criminal Procedure, in a capital case, review the evidence and order a new trial.
2. The evidence is analyzed and held not to be conclusive.

Appeal by Angelo Carbone from a judgment of the Supreme Court at a trial term in New York county, convicting him of murder in the first degree. Reversed.

Hal Bell and Ambrose H. Purdy, for the appellant.

James D. McClelland and Charles E. Le Barbier, for respondent.

PER CURIAM. The defendant was charged in the indictment with the crime of murder in the first degree, committed upon one Natele Brogno, in the evening of September 12, 1897, in the city of New York. Upon his arraignment he pleaded not guilty. A trial being had, he was found guilty, as charged in the indictment, upon the verdict of a jury. The evidence adduced by the People showed that, upon the evening in question, the defendant was first seen pursuing the deceased upon Leonard street, in the direction of Center street. He was seen to strike at the deceased with his fist, and the latter fell to the ground upon his face. The defendant then jumped upon his back with his feet, and, bending down, again struck him several times with his clenched hand. Several police officers came up, and the defendant was seized. The deceased, being raised from the ground, was seen to have been stabbed in the abdomen, and to have been cut upon one of his wrists. He died within a very few minutes after the occurrence. Prior to his death, upon being asked, in the presence of the defendant, if he was the man who stabbed him, the deceased answered, "Yes." When further asked what the defendant had stabbed him for, he had already become unconscious, and was unable to answer. The defendant was searched, but no weapon was found upon him. Some time afterwards, however, a small penknife, with an open blade, was found at or near the spot where the deceased had fallen. After the deceased had stated that it was the defendant who had stabbed him, the latter was asked why he had done so, and he replied, denying the stabbing, and denying that he had any knife. The examination of the body of the deceased, made by the ambulance surgeon and by the coroner's physician, who made the autopsy, showed the existence of two incised wounds, one upon the forearm, and the other in the abdomen, the latter

of which was the cause of the death. On the part of the defense, a nephew of the defendant, a boy twelve years of age, testified that, upon the evening in question, he saw his uncle fighting with the deceased, and using his fists; that the latter ran away; and that, while he was so running, one Alexander Ciarmello came up with a knife in his hand, appearing to be a stiletto of six or seven inches in length, and, while the deceased was looking back over his shoulder, struck at him twice with the weapon. The witness said that Ciarmello then put the weapon in his pocket, and walked away, and that the deceased, after running some 200 or 300 feet further, with the defendant in pursuit, fell down. The coroner's physician, upon being recalled on behalf of the defense, testified, upon being shown the knife which was picked up at or near the place where the deceased fell, that it was absolutely impossible for it to have caused the wound in the abdomen; that it was too short. The district attorney states in his brief, and it was admitted by him in open court, with commendable fairness, to be the fact, that, since the trial and conviction of the defendant, Alexander Ciarmello was indicted and arrested for the killing of the deceased, and has been tried and convicted of murder in the second degree upon the charge, and has been sentenced to imprisonment for life.

We are satisfied that this is a case where justice requires a new trial, and that we should exercise the power conferred upon us for that purpose by section 528 of the Code of Criminal Procedure. While the peculiar situation which is presented moves us to exercise this power, we also think that the case of the People cannot be said to have demonstrated the fact of the killing of the deceased by the defendant beyond a reasonable doubt. That fact and the fact of the death of the person alleged to have been killed are essential to be established by the People upon such an issue,—the latter by direct proof, and the former beyond a reasonable doubt. Penal Code, § 181. None of the witnesses for the People saw a knife or any weapon in the hands of the defendant, and none was found as the result of a search upon his person; while the small knife which was found upon the spot could not possibly have inflicted the wound, according to the testimony of the People's witness, the coroner's physician, who performed the autopsy. There was nothing in the evidence

adduced on behalf of the prosecution, showing what had occurred prior to the moment when the deceased was seen running in Leonard street, pursued by the defendant; and while, from the statement of the deceased and the other circumstances, an inference was possible that he had come to his death by a wound intentionally inflicted by the defendant, yet the evidence is not of such a nature as to preclude us from holding that it was lacking in conclusiveness. Therefore, under the circumstances, and in view of the admission of the district attorney, we think that the case is one for the exercise of our power to order a new trial, and that it is required in the interest of justice. The judgment of conviction should be reversed, and a new trial ordered.

All concur, except O'FRIEN, J., absent.

Judgment reversed, etc.

PEOPLE v. COREY.

157 N. Y. 332—51 N. E. Rep. 1024.

Decided November 22, 1898.

HOMICIDE: JUDICIAL MISCONDUCT: *Mistaken as to evidence—Misstating evidence to jury—Dying declarations—Evidence—Reviewing errors without exceptions—Instructions.*

1. Evidence considered, and while not conclusive as to murder in the first degree, still the verdict was not unwarranted.
2. It is not the prerogative of the judge to tell the jury what evidence a witness gave on a former trial.
3. Where a witness for the People was making damaging admissions as to her testimony on a former trial, which tended to discredit her, it was error for the trial judge to interfere and stop defendant's counsel, and ask the witness how she "understood it," and, turning to the jury, ask them if they heard her say certain things; and further to interfere a second time and say that he took the position that she did so testify on the former trial, and that the minutes so show, etc., and that he would not spend any more time to hunt up that testimony; whereas the judge was mistaken, and neither the minutes nor any other evidence supported his statements. This action of the judge was characterized as "an unintentional but actual perversion of the witness' testimony under circumstances calculated to help the People and hurt the defendant."

4. The constitutional provision that the accused be confronted with the witnesses against him refers to *living witnesses*, and not to dying declarations.
5. It is error to charge the jury that the lack of hope in dying declarations is always sufficient to cause them to speak the truth. There is no such presumption of law, and experience does not demonstrate its correctness.
6. It being in evidence that a principal witness for the State declared that he was going to swear the defendant to hell, etc., defendant's counsel requested an instruction that the jury might consider such declarations in weighing witness' testimony. The court refused this, saying that he had called the attention of the jury to every fact they had a right to consider, whereas he had not instructed on this particular feature of the evidence. The court's statement was held to be misleading and prejudicial; and further, the jury should have been instructed on this phase of the evidence.
7. Under the provisions of the Code of Criminal Procedure, the court will, in capital cases, consider all material errors, though no exceptions were saved.

Appeal by Michael Corey, *alias* Michael Kelly, from a judgment of conviction of murder in the first degree at a trial term of the Supreme Court, in Madison county; and also from an order of said court in which his motion for new trial was denied.

The defendant appealed from a previous conviction before the same justice, which was reversed for errors which did not develop at the second trial. (148 N. Y. 476.)

Albert O. Briggs and *John E. Smith*, for appellant.
M. H. Kiley, for the respondent.

VANN, J. The defendant was indicted for the murder of James George, an Indian, on the 27th of September, 1894, at the house of Orson Webb, in the town of Eaton, Madison county. This house was a shanty, twelve or thirteen feet by sixteen, rudely built of boards nailed to four posts set in the ground, and covered with the same material. It had no cellar or foundation, and the rough plank floor had numerous apertures. There was but a single room, with no partitions, but one door, which was on the south side, and near the southwest corner, and but one window, which was on the west side. The structure was situated in the woods, remote from a highway, and was reached

by a path leading through a pasture. At the time of the affray an old stove stood opposite the door, and in the northwest corner was a cupboard made of rough boards. On the south side of the room, and about four feet east of the door, was a shelf, near which was a butcherknife belonging to James George, thrust in a crack; and on the shelf was a common pocketknife, with two blades, which belonged to one of Webb's children. A table, some chairs, and two or three old beds resting on the floor, without bedsteads, completed the furniture. The beds consisted of straw ticks covered with soiled and ragged bedclothing, and the room and all things in it, including the people, were described by a physician as extremely filthy. In this room Orson Webb, Sarah, his wife, his two daughters, Susan and Libbie, aged respectively sixteen and eighteen, and four younger children, besides James George and the defendant (ten human beings in all), lived and slept. These persons, with Cora Bennett, a niece of Mrs. Webb, were present when the crime in question is alleged to have been committed.

The defendant was attached to Susan Webb, and had some feeling towards George on account of his attentions to her. Each had recently made threats against the other on her account, although they had slept together, and had worked together in peace that fall. The threats made by George, although less frequent, were not less significant than those made by the defendant; for, but three or four days before the tragedy, he said that, if the defendant did not keep away from his girl (Susie Webb), he would cut his heart out with the knife that he held in his hand at the time. About three hours before the affray the defendant accepted the invitation of George to eat supper with him, and the two men ate and talked together as friends. During the afternoon Webb and the defendant had been engaged in erecting a woodshed in the form of a lean-to, and banking up the shanty for winter. They had a jug of beer, which was consumed by them, with the help of Cora Bennett and Susan and Libbie Webb. After supper, Susan suggested that they have something more to drink, and gave her father a dollar to go and get it. He went nearly two miles and back, and returned about eight o'clock in the evening with another jug of beer, containing a gallon, and two pints of whisky. During his

absence, Susan obtained from the pocket of George's coat, upon his suggestion, a pint of alcohol, which, after being diluted with water, was drunk by George, the defendant, and the girls. Half of the beer and whisky procured by Webb was drunk by the same persons, aided by Mrs. Webb. While every person in the room except Webb and the younger children was more or less intoxicated, the defendant and George drank the most, and the latter was the most affected. The party alternated in drinking beer and whisky, dancing during the interval to the music of Webb's violin; the two men being in their shirt sleeves. When Webb returned with the beer and whisky, Libbie was already asleep on one of the beds on the floor, and, as no explanation of the fact was given, it is not difficult to infer why she was overcome by sleep at that early hour. No partners were taken nor sets formed for the dance, which was described as a jig or skirt dance, and was performed by "jumping about and dancing around." After thus drinking and dancing for an hour or more, the orgies culminated in the transaction which is the subject of this appeal. Shortly after nine o'clock Cora Bennett and Susan were sitting or lying on a bed on the south side of the room, and George was sitting beside them. The defendant was sitting in a chair on the west side of the room, south of the window, and Webb and his wife sat north of him. A lamp on the table furnished the only light. Webb testified that the defendant said to George, "Why can't you get up and sit in a chair, and not be sitting there on the floor?" and that George replied, "I am doing no hurt here," but finally got up and began to dance with the little girl, Mary. After dancing a short time he crossed over to the west side of the room, where the defendant was sitting, had some words with him, went to the shelf, and stood there with Susan, when the defendant, who was still seated, asked him, "What are you doing there, talking to that girl?" George replied, "Ain't I a right to talk to this little girl?" whereupon the defendant said, "No," jumped towards George, and struck at him; but George pushed him off, and the defendant "dodged down to get under his arm," which was raised, and struck him six or seven times in the side.

Mrs. Webb swore that during the evening the defendant told her that he did not like the Indian, and that he would have

trouble with him; that later, after the two men had had some words, the defendant jumped up and struck at George, who "guarded his blow off and knocked him back up against the door, and he came back again; and I did not see what he had in his hand, but he made a motion seven or eight times at his side." Susan Webb stated that, when the defendant spoke to George about sitting on the bed with the girls, George started to get up, but, apprehending trouble, she took hold of his arm, told him to sit down and not have any fuss, whereupon he became quiet. Shortly after that, George went over to the other side of the room, and then came back to the shelf, while the defendant remained on the west side. The two men had some words, when the defendant arose from his chair and jumped towards George, who knocked him back against the door, whereupon she saw the defendant make motions towards George as if stabbing him. No other eye-witness of the affray was sworn, and the failure to call Cora Bennett was not accounted for, except by the suggestion of the defendant's counsel, that she was confined in a penal institution. The butcherknife was not disturbed, and no one saw either of the men take the other knife from the shelf; but it was seen there just before George passed from the west side of the room to the shelf, and was not seen afterwards. The defendant was not seen by the shelf, after the knife was last seen upon it, until he jumped towards George and was knocked against the door. The evidence tended to show that the defendant's shirt and trousers were badly torn on the occasion. The next morning one of his eyes was somewhat swollen, and there was a cut over it from a quarter to a half an inch in length. No one saw the knife in the defendant's hands at any time, but after he had made repeated motions towards George, as if stabbing him, George sank to the floor; and the defendant kicked at him, and went out of doors. Webb, upon discovering that George had been stabbed, followed the defendant out and asked, "What did you do with the knife that you cut Jim with?" and the defendant replied, 'I threw it back into the bushes. I only stabbed him with the little blade. It is only a flesh wound. He will get over it.' He also said, according to Webb's statement, "When I fight with a man I calculate to whip that man, if I have to kill him." Webb returned to the house,

and, upon examining George, found eight wounds, apparently made with the blade of a knife, upon the left side of his body. Six days later George died. The defendant, upon leaving the house, went to an adjoining farm, where he had worked, and stayed all night. The next day, when asked by an acquaintance where he got the cut over the eye, he replied that he got into a fight at Webb's the night before, and stabbed an Indian three or four times. He was then told that he had got himself into a scrape, whereupon he left for the city of New York, where he formerly resided. While there he wrote a letter to Susan Webb, in which he said: "Susie, I can't tell you how sorry I am for getting in that trouble and having to leave you; but you are as much to blame as I am, for, if you had not carried on the way you did that night, I would not have got a-fighting with that God-damned Indian; but never mind; it may be all for the best, Susie. After I had the trouble that night, I went down to Ira Spaulding's, and stayed there until morning and was going to go to work for him that day, but I was afraid Jim would get a warrant out for me; so I made up my mind the best thing I could do was to come to New York until it would blow over.

. . . Remember, Susie, I love you with all my heart, and shall never forget the way you treated me; let it be good or bad, I cannot help but love you. Remember, also, that I told you that I would kill any one that ever tried to come between us, and so, Susie, so help me God, I will; and that is why I cut Jim with that knife. I meant to kill him, and will, if he ever comes monkeying around again while I am there." Not long after, on being arrested, he asked if George was dead yet, and was told, "No," when he replied, "Well, if he ain't, he ought to be."

Eight incised wounds, such as could have been made by the large or the small blade of an ordinary pocketknife, were found on the body of George, only one of which was fatal, and that not necessarily so. The wound of deepest penetration was less than two inches in depth, so that either the small blade or slight force must have been used in making the wounds. Death resulted from blood poisoning caused by the formation of pus in the pleural cavity, which was not withdrawn, owing to the unsanitary condition of things in the Webb house, and the danger of operating without antiseptic precautions. George was a

strong, healthy, well-developed man, somewhat given to quarrelling, especially when under the influence of liquor. Six witnesses, acquainted with his reputation, swore that it was that of a quarrelsome, fighting man. Four records of the court of special sessions were read in evidence, showing that he had been convicted for drinking and fighting. The defendant had a horrid disease, was not as strong as George, and was usually quiet and peaceable. On three occasions he had received somewhat severe injuries on the top of the head, one resulting in a fracture of the skull, which left scars and a depression, with tenderness under pressure. Several medical experts, answering a hypothetical question, testified that in their opinion he was insane at the time of the affray, but the weight of medical testimony was the other way. Several witnesses, including two justices of the peace, testified that the character of Orson Webb for truth and veracity was bad, and that they would not believe him under oath; but he was sustained by an equal number of witnesses, who apparently knew his reputation equally well. He was once convicted and suffered imprisonment for assault and battery, and was once convicted, upon his own confession, for petit larceny, but was not punished.

The character of the inmates of the Webb house, who were the only witnesses to give the history of the transaction, the condition of some of those witnesses when they saw the affray, the disposition of George to quarrel and fight when under the influence of liquor, the intoxication of both participants when the affray began, the fact that violence was used by each towards the other, the absence of any weapon when the trouble began, the nature of the weapon used, and the confusion in the minds of the eyewitnesses as to what actually took place, are important facts to be borne in mind in reviewing this case. The evidence warranted the jury in convicting the defendant of murder in the first degree, as there was some time for deliberation; still, the facts already mentioned leave that essential feature without the support that it might have had, if the witnesses and participants had been persons of a different character and in a different condition. While the defendant was the aggressor when he sprang towards George and struck at him, there is no evidence that he then struck with a weapon, or with anything except his

fist. The blow was promptly returned by George, who knocked the defendant against the door, and from that instant until the end of the affray the time was very short. While it was long enough for sufficient deliberation to stamp the crime as murder in the first degree, it does not follow that because there was time enough to deliberate there was in fact deliberation. The two drunken men exchanged blows, the defendant striking first, but the blow of the other man being the most effective. Up to this time there was no opportunity for the defendant to get hold of the knife, yet almost instantly he was plunging it into the side of his victim. Whether he snatched it from the shelf or from the hand of George, who had had an opportunity to get it, cannot with certainty be told. Whether it was open or shut when his hand first clasped it is not known. Whether the fatal wound was the first or the last inflicted is not disclosed. The solution of these questions would reflect much light upon the fundamental question of deliberation, yet they cannot be solved from the evidence before us. If it appears that a man charged with murder in the first degree armed himself with a deadly weapon before making the fatal assault, it points strongly towards "a deliberate and premeditated design to effect the death of the person killed;" but it is quite different if he first makes an assault with his fist, and during the struggle that follows seizes a weapon ready to his hand, and at once inflicts a mortal wound with it, for both the shortness of the time and the excitement of the occasion make it much less probable that he acted with deliberation, as it is known in the criminal law. Still, previous threats and subsequent declarations as to his intention have an important bearing upon what was passing through his mind just before he inflicted the fatal injury. As there was a conflict in the evidence, and opposing inferences might be drawn from the facts, we do not feel warranted in setting aside the verdict of the jury for error of fact; and we proceed to consider the alleged errors of law.

Mrs. Webb, during her cross-examination, testified that she thought the shirt worn by the defendant was badly torn on the occasion in question; that she had recently washed it, and it was not then torn; that she saw him wearing it during the evening, and did not see that it was torn, but after the affray she observed

that both sleeves were torn, and that the shirt was torn in other places, including the side and under the arms. She was then asked by the defendant's counsel: "You know it was torn right there in that quarrel,—in that fight? A. I think most of it was torn in that way. Q. Did you see this man George after he had struck Corey? Did you see where he grabbed him,—whether by the sleeves or by the bosom? (Objected to. Objection sustained.)" But the witness answered: "I didn't notice. Q. Did you observe? A. No, sir. (Objected to as incompetent and immaterial. Objection sustained.) Q. Did you observe whether he grabbed him or not? A. No, sir; I didn't. Q. You didn't observe? A. No, sir. . . . Q. You didn't observe just whether Mr. Corey grappled onto a hold of this man,—you didn't observe, did you? A. No, sir. . . . Q. You say you didn't observe whether he grabbed him or not? (Objected to.) A. No, sir; I didn't." The court then remarked to counsel, "If you are simply talking loud to drown it, she certainly said that he didn't grab him at all," and, turning to the witness, asked, "How do you understand it?" and she answered, "He asked if I knew whether he grabbed or not." The court then, turning to the jury, asked, "Did you hear her say that he didn't grab him at all? Did you hear that, any of you?" and a juror answered, "I heard that." Upon being further cross-examined, the witness testified that she saw George strike defendant and knock him back against the door, or against the west side of the house, and subsequently she was asked: "Now, did somebody suggest to you that you keep back this idea that George struck Corey, and that before the former trial,—that you not tell of that? A. No; I think I told it here, didn't I? Q. Didn't some one tell you that you could keep that back? That is the fact about it, isn't it, Mrs. Webb? A. I believe there was a person said I wasn't obliged to swear to that, unless I had a mind to, if it wasn't called for. Q. That was before you were sworn the other time, was it? A. When I was down to the house. Q. Did you keep it back on the former trial? A. I don't know whether I swore to it at that time or not. I am swearing to it now. Q. Don't you know that you kept it back the other time, and didn't tell it? Don't you know you did? A. Yes. Q. You did it on that advice? A. He said, if it

wasn't called for, I shouldn't mention it. The court: What was it,—about his throwing up and pushing the Indian back against the door? Q. Pushing him and striking him? A. Striking him. Q. You kept it back the other time? A. I believe I did. I don't know whether I did or not." Thereupon the court, addressing one of the counsel for the defendant, said: "Do you say, Mr. Briggs, that she kept it back entirely? I understand that the minutes show, and my recollection would be, that she did swear that George struck him." Shortly afterwards the court again interposed and said: "The court has taken the position that she did swear to it upon the other trial. I think she is mistaken about it; I think she is mistaken about her swearing to it; I am not going to spend any time to hunt up that testimony; it is my recollection of it, and it is about enough of it for just this time." Except as stated, it did not appear, either by the minutes or in any other way, that the witness so testified upon the first trial.

Thus, upon two occasions the learned justice presiding inadvertently stated his own recollection as to a material fact, and was mistaken both times. On the first occasion the judge stated that the witness had sworn one way, when she had in fact sworn another. Whether George grabbed the defendant after knocking him against the door just before the stabbing took place was important upon the question of deliberation, as it tended to show a struggle and a fight. There is a marked difference between stating that George did not grab the defendant at all, and that the witness did not see whether he grabbed him or not; for the former, if the witness was to be believed, took the element of a fight out of the case, to a great extent. The witness had repeatedly testified that she did not notice whether George grabbed the defendant or not, and she did not at any time testify that George did not grab him at all, yet the justice, with all the weight of his high character and impartial position, declared that her testimony was that "he didn't grab him at all." Upon appealing to the jury for confirmation, one of them stated, in substance, that he heard the witness testify that George did not grab the defendant at all. According to the record before us, both court and juror were mistaken, and it is not probable that any one of the other eleven jurors, under the circumstances,

would think that the evidence of the witness was other than as the court and the twelfth juror had stated it. It was an unintentional but actual perversion of the witness' testimony, under circumstances calculated to help the People and hurt the defendant. The torn shirt indicated that George had seized the defendant, but the witness was, in effect, made to say that this did not take place.

On the second occasion, when an erroneous statement from the bench went before the jury as evidence, the witness had virtually admitted that she was guilty of suppressing evidence on the former trial. This reflected on her candor, if she was correct, but not if the court was correct. His statement tended to relieve an important witness of a serious imputation affecting her credibility. It was not proper for the court to tell the jury what the witness had sworn to upon the previous trial, when there was no evidence that she had so sworn. Such a statement to the jury should be made only by a sworn witness. The trial judge had no right to state his recollection of what the witness had sworn to upon the former trial, for it was not legal evidence of the fact. The statement of the court not only took the place of the testimony of the witness, but it was directly the reverse of what the witness had in fact testified to. It went to the jury without the sanction of an oath, yet came through such a channel as to have more effect than the statement of almost any witness under oath. It was to a certain extent a certificate of good character to a leading witness, who had shown that she did not deserve it. A newspaper paragraph would have been equally competent and less dangerous.

We have recently held that, even on the trial of a civil action, a statement by the trial judge, made to the jury, of his personal recollection of what occurred at a previous trial in respect to a material fact, was reversible error, and that it was not cured by instructing the jury to dismiss the statement from their minds. *Brooks v. Rochester Ry. Co.*, 156 N. Y. 244, 252, 50 N. E. Rep. 947. We repeat with greater emphasis in this action, because it involves life and death, the following language used by Judge O'BRIEN in that case, which involved only a right of property, viz.: "It will not detract in any degree from the high character of the learned judge to say that he did not at the mo-

ment fully appreciate the importance of his remarks, or the probable influence which would be given to them by the jury. He was about to submit to them a disputed question of fact upon the evidence, and he virtually threw into the scale against the defendant all the weight of his impartial position and unbiased recollection upon that very question. There was no longer any chance for the defendant to succeed, at least upon that issue." We think that the statements inadvertently made in the hurry of this long trial by the learned justice below are presumed to have been injurious to the defendant. Whether they in fact changed the result or not, we cannot say judicially that they did not affect it. He had the right to have none but legal evidence received against him, yet illegal evidence was received, of a character so material and important that we cannot say to what extent it may have influenced the verdict. Under all the circumstances, and especially in view of the somewhat close question of fact on the subject of deliberation, we think these errors, although not excepted to, are too serious to be disregarded.

The *ante mortem* statement of the deceased, made four days before he died, was read in evidence on behalf of the People, in which he declared, in substance, that the defendant attacked him without provocation or excuse, and inflicted the wounds in question upon him. The defendant's counsel objected to this evidence as incompetent, improper, and hearsay; and they now urge that dying declarations, although competent at common law, are no longer competent, because the Code of Criminal Procedure, in prescribing the rights of a defendant in a criminal action, provides that he is entitled "to be confronted with the witnesses against him in the presence of the court," except in certain cases not now material. Code Crim. Pro., § 8, par. 3. We do not think the legislature intended to abolish the rule governing the admission of dying declarations, and such certainly has not been the understanding of the profession or the courts. We are not aware that this question has ever been raised before in this State, and yet the Criminal Code has been in force for nearly twenty years, and the Revised Statutes, which contain a similar provision, for nearly seventy years. 1 R. S. 94, § 14. The right of the accused to be confronted with the witnesses against him has always been a part of the bill of rights, and yet

dying declarations have been received in evidence for time out of mind. The legislature doubtless intended to confer upon a defendant in a criminal action the right to be confronted with any living witness against him. It is upon this ground that the objection to the introduction of such declarations in evidence against a defendant, based on his constitutional right to be confronted with the witnesses against him, has been uniformly overruled in those jurisdictions where such constitutional provisions are in force. It is invariably held that the deceased is not a witness, within the meaning of such a provision or of the bill of rights, and that it is sufficient if the defendant is confronted with the witness who testifies to the declaration. *Mattox v. United States*, 156 U. S. 237, 240, 15 Sup. Ct. 337; *Brown v. Commonwealth*, 73 Pa. St. 321, 326; *Campbell v. State*, 11 Ga. 353; *People v. Glenn*, 10 Cal. 32; *State v. Dickinson*, 41 Wis. 299, 302; *Robbins v. State*, 8 Ohio St. 131; 1 Bishop's Crim. Pro., § 1208; Greenleaf's Ev., § 156; 1 McClain on Crim. Law, § 425.

The court, in its charge to the jury upon the subject of dying declarations, said to them that "it is the experience of mankind that the premonition of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth." The court cautioned the jury not to give as much weight to such evidence as if the same statement had been testified to by the deceased when in health and subject to cross-examination. He also left it to them to decide whether the deceased was without hope of recovery when he made the declarations, and told them that such declarations were to be taken with great caution, as they might be misunderstood, or might have been made in response to suggestive questions. The instruction, however, above quoted, was left substantially unchanged. In *People v. Kraft*, 91 Hun, 474, 476; affirmed, 148 N. Y. 631, 43 N. E. Rep. 80, it was said by the Supreme Court that "it is not the experience of mankind that the apprehension of immediate death, from which there is no hope of escape, is always sufficient to induce persons so situated to speak the truth. Criminals convicted on the most convincing evidence often assert their innocence while standing face to face with their executioners." We held in that case that it was reversible

error to charge the jury that a dying declaration should be "given all the sanction of evidence which the law can give to evidence." Dying declarations are received from necessity, in order to prevent a failure of justice, upon the theory that the belief of impending death is equivalent to an oath. The rule, as we understand it, goes no further. The fear of punishment by the law for perjury furnishes no safeguard that the declarant will speak the truth, and hence such evidence has no sanction except a belief in responsibility after death. All men, however, do not entertain that belief. Moreover, as was pointed out by Judge Gray in *People v. Kraft, supra*, the power of cross-examination, which is wholly wanting, is quite as essential in the process of eliciting the truth as the obligation of an oath. We recently reversed a judgment of death in a case in which the dying declaration of the deceased seemed utterly unreliable. *People v. Carbone*, 156 N. Y. 413, 415, 51 N. E. Rep. 23. Courts of high standing have held that an instruction that dying declarations are to receive as much credit as testimony given under oath in open court is erroneous. *State v. Van Sant*, 80 Mo. 67, 77; *State v. Mathes*, 90 Mo. 571, 573, 2 S. W. Rep. 800; *Lambeth v. State*, 23 Miss. 322, 359. It has happened that a dying declaration accusing the defendant made one day was contradicted by another dying declaration of the same person made on a subsequent day, stating that the defendant "did not do it." *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276. So dying declarations have been shown to be positively untrue. *White v. State*, 30 Tex. App. 652, 18 S. W. Rep. 462. The elementary writers upon the subject dwell upon the infirmities of this kind of evidence, and all authorities agree that the credibility of the declaration is wholly for the jury. Underhill on Criminal Evidence, § 110; 3 Rice on Evidence, 336; Roscoe's Criminal Evidence, 35. The learned trial judge virtually told the jury that if the deceased had no hope of recovery when he made the declaration, and was correctly reported, according to the experience of mankind he spoke the truth. It is true that he directed them to consider the evidence which tended to corroborate or contradict the statement made, and left it to them to say whether in fact the statement was true or not, and whether the general proposition laid down was correct or not in

the case in hand. In other words, he allowed the jury to find that in this particular instance the deceased did not speak the truth, notwithstanding the circumstances surrounding him had always been found sufficient to influence other persons so situated to speak the truth. This was equivalent to saying that, if they should find this dying declaration untrue, it would be the first instance on record, yet they might so find if they saw fit. We think that the main proposition laid down by the court upon the subject, even when considered with what preceded and followed it, was erroneous and tended to injure the defendant.

Evidence was given in behalf of the defendant tending to show that Orson Webb, during his attendance as a witness for the People, had stated that he was going to swear the defendant to hell; that a bystander said, "That is a pretty hard saying for the main witness in the case for the People;" and that Webb replied, "I am going to do it, any way." Webb, in a guarded manner, denied this. The court was asked to charge the jury that they had the right to take this declaration into account in passing upon the weight of Webb's evidence; but the court replied, "I have called their attention to every fact that they have a right to take into consideration, whatever he said on the subject connected with the trial." In fact, the court had not in any way called the attention of the jury to the subject of the threat made by Webb. He had, however, directed their attention to the evidence tending to impeach and sustain the character of Webb, and, among other things, had said to them: "Now, of course, it is true that, while it is not always safe, still it is true that there are men who will engage in the commission of petty crimes, and yet you may rely upon their testimony, when that testimony is disconnected with any crime of which they are guilty or with which they are charged; and you have the right to take into consideration all the evidence which was given by the witness Stimson, who swears that this man's credit is such that he is fairly entitled to consideration. You have a right to take into consideration that when he was arrested for taking cucumbers from some place, where it is claimed that he had had the man arrested for selling liquor to a minor, when he went before the magistrate he confessed his guilt, and that he was convicted. Now, is such a man as that liable to tell the truth?"

Do you believe what he says? Gentlemen, you have a right to take into consideration the evidence of the balance of the Webb family as to this transaction there at the house, and see whether they corroborate the testimony which he has given. If he is fully corroborated, you have the right to take that into consideration for the purpose of seeing whether he is worthy of belief. Gentlemen, you have the right, and it is your duty, to take into consideration the character and standing and intelligence and respectability of all the witnesses in the case, from the highest to the lowest." While the court thus submitted to the jury the credibility of Webb in a general way, he did not mention the threat, which was of great importance, because it indicated a strong bias against the defendant. In response to the request made, he did not decline to charge further upon the subject than he had already charged, but virtually stated that he had called the attention of the jury to every fact that they had a right to take into consideration as affecting Webb's credibility. This, we think, was error, because the jury clearly had a right to take the threat into account, and should have been permitted to do so.

It is true that none of these errors was challenged by an exception, but, under the humane statute governing our powers in capital cases, an exception does not stand between life and death. We are authorized to order a new trial when we are satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, even if no exception was taken in the court below. Code Cr. Pro., § 528; *People v. Barberi*, 149 N. Y. 256, 278, 43 N. E. Rep. 635; *People v. Leonard*, 143 N. Y. 360, 367, 38 N. E. Rep. 372. While we are required to give judgment without regard to technical errors or defects which do not affect the substantial rights of the parties, we cannot say in this case that the errors were technical, or that the defects did not affect a substantial right of the defendant. *Id.*, § 542. The great power intrusted to us of reversing without an exception should be cautiously exercised, but it was given to be used, and it should be used, whenever we are satisfied from the record that justice requires a new trial. In the interest of the People, as well as the defendant, it should be exercised when the question of fact as to guilt, or the

degree of guilt, is close, and there is a reasonable probability that the error affected the result. A multitude of rulings, made without much chance for reflection, during a protracted and closely-contested trial, is apt to result, and perhaps of necessity must result, in some errors of law; but, when the percentage is so small that another trial would not be apt to reduce it, a new trial should not be ordered, unless upon the facts. When, however, the errors, even if not excepted to, are so grave and numerous as to satisfy the court that the defendant has not had a fair trial, under all the circumstances, the verdict should be set aside. Without further discussion, we close our review in the words of Judge MARTIN, used in rendering judgment on the former appeal in this action: "After carefully examining and considering the evidence, the rulings, and the charge contained in the record before us, we have become satisfied that justice requires us to grant the defendant a new trial in this action. In reaching this conclusion, we have not been wholly controlled by any one of the questions discussed, but upon a consideration of them all we have been led irresistibly to the conclusion that in the furtherance of justice a new trial should be granted."

The judgment should be reversed and a new trial ordered.

HAIGHT, J. (dissenting). There is really no dispute about the main and controlling facts in this case. Whatever conflict exists pertains to minor details, which could not and ought not to change the result. Suppose George did catch hold of the defendant's shirt and tear it while receiving the stabs which caused his death, under the evidence, it could have occurred at no other time. I fail to see how this fact, if such it be, tends to relieve the defendant, or to show an absence on his part of motive and deliberation. His declarations before the act and his written statements afterwards show quite conclusively what his motive and intentions were. If this case was involved in any doubt, I should heartily join with my associates in the exercise of a discretion to award a new trial. But, viewing the case as one in which the essential and controlling facts are without dispute, I think we should disregard the technical errors and defects pointed out and affirm the judgment.

VANN, J., reads for reversal of judgment and granting new trial; PARKER, C. J., and O'BRIEN, BARTLETT, and MARTIN, JJ., concur; HAIGHT, J., reads for affirmance of judgment, and GRAY, J., votes for affirmance.

Judgment reversed, and new trial granted.

NOTE (by H. C. G.).—*Inferential indorsement of witnesses by the judge.*—In the current homicide case of *State v. Staley*, 45 W. Va. 792 (1899), 32 S. E. Rep. 198, physicians had testified, on behalf of the defendant, as to the treatment of the wounds of the deceased, being in opposition to the evidence of Dr. Burgess and others who had operated upon the deceased. Subsequently, the court, in discussing a question of evidence in the hearing of the jury, referred to Dr. Burgess by way of illustration, and spoke of him as a man of unquestioned integrity. These remarks were excepted to, as tending to disparage the testimony of the defendant's witnesses. In its opinion the Supreme Court said:

"The courts have ever been exceedingly careful of the province of the jury in the trial of cases. In *McDowell v. Crawford*, 11 Grat. 405, Judge Moncure quotes approvingly 1 Rob. Prac. 338-344, where the cases are collected, and says: 'They evince a jealous care to watch over and protect the legitimate powers of the jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that, when the evidence is parol, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proven, or even an intimation that written evidence states matters which it does not state, will be an invasion of the province of the jury.' Judge Green, in *State v. Hurst*, 11 W. Va. 54, referring to those cases cited by Judge Moncure, says they were all civil cases, and that 'there is and ought to be a distinction between the trial of civil and criminal cases in many important particulars,' and continues: 'If the province of the jury in a criminal case may be allowed to be invaded, the liberty and lives of the citizens would not be safe. In times of peril, when commotions in the State exist, untrammelled jury trials are the greatest safeguard of the citizens. If, in a civil case, it is error, for which the verdict should be set aside and the judgment revoked, for the court to make a remark, in the presence of the jury, calculated to mislead them, or calculated to cause them to give more or less weight to any testimony before them, for much stronger reasons would it be error to make the same remark in the trial of a criminal case.' This subject is discussed at some length by Judge Dent, in *Neill v. Produce Co.*, 38 W. Va. 228, 18 S. E. Rep. 563, and the cases there cited. The remarks made by the judge in this case, it is true, were by way of illustration; but unfortunately, for the purpose of the illustration, he named one of the State's witnesses who had been examined in the case, and referred to him as one 'whose integrity is not to be questioned.' Suppose that he were placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment (just as the

witness referred to had testified in this case), and, having so testified, the opposite party were to bring here two or three witnesses from another county,—say, from Huntington,—who are entire strangers to the people of Wayne county, and who, upon the witness stand, were to testify to their having heard the said State's witness make statements directly contradicting those made by him upon the witness stand, etc. While the judge did not mention the names of the supposed witnesses from Huntington, yet it was a fact that defendant had two witnesses from Huntington, summoned there and placed them upon the stand to testify in the case as experts touching the matter of the evidence given by the witness Burgess. What was necessarily the tendency of the remarks on the minds of the jury but to make an impression thereon highly favorable to the testimony of the State's witness, who was so referred to by the court as of unquestioned integrity, and, consequently, his testimony was entitled to the greatest weight, while the other witnesses were mentioned as entire strangers, brought from another county, whom the people of Wayne county did not know? The tendency of the remark would be to weaken their testimony in the estimation of the jury, to the prejudice of defendant. Whether it affected their verdict or not we cannot tell. Taking the whole record together, I am inclined to the opinion that none of the errors complained of really affected the minds of the jury prejudicially to the rights of the defendant; yet they may have done so, and, without such errors, it is possible the jury might have returned a verdict more favorable to him. For the reasons herein stated, the verdict will be set aside, the judgment revoked, and the case remanded for a new trial to be had therein."

In *Feinberg v. People*, 174 Ill., on p. 617 (1898), during an altercation about the cross-examination of a police officer, between the court and defendant's counsel, the latter remarked: "I object to the ruling of the court, and take exception. Your honor will remember that in the entire testimony of these witnesses on behalf of the State, there is no testimony whatsoever tending to show guilt against . . . Feinberg, except that of motorman Freligh, and I can show by this officer that this identification was procured by illegal means."

The court: "Do you mean to say, sir, that there is no evidence here to show the guilt of the defendant? I say there is evidence."

This was held to be serious error; that it came very near being a declaration by the court, in the presence of the jury, that the defendant was guilty.

In *Marzen v. People*, 173 Ill., on p. 56 (1898), which was a homicide trial, the effort was to get a witness to identify an oil can as the defendant's. Finally the court said to the witness: "What is your best judgment about that—what is the best guess you can make about whose can it was?" Mr. Elliot: "I beg pardon, your honor; I shall object to making any guesses." The court: "Perhaps you are right, too. I would like to have him give us his best judgment about that." . . . Ans. "I can only give that. I know that can had a bend on top." The court: "I believe that is the same can." Ans. "Yes, sir; I believe it is, the way it looks on the top and the crack is in it, and

if it leaks down at the bottom then I believe it is." Objection, and motion to strike out. The court: "I will let it stand. It may be improper." The Supreme Court said that the remark (or question) of the judge was calculated to unduly influence the jury in the matter of determining a question of fact." The court observed that the witness did not express an opinion that the can was the same, until after the pointed suggestion of the court, and that an ignorant man like the witness would doubtless understand from the judge's suggestive examination that he was expected to identify the can. The court might have added that a weak and very doubtful witness, under the novel, exciting and trying ordeal of such an examination, might thus be urged and fortified to make an opinion positive which would otherwise have been doubtful. He might feel that if the judge, with his superior knowledge, experience and authority, considered the evidence of identity sufficient, that he could do the same.

It was objected that no exceptions were saved in the trial court as to this remark. The court, however, said that the whole of the evidence of the witness was objected to, and that the remark of the judge was but a part of an improper examination.

However, on principle it would seem that it should not be necessary to take exceptions in order to have such remarks of the court reviewed on appeal, for the reasons (1) that the judge has gone outside of his legitimate sphere of duty in making them; (2) that the exception can in no way undo the prejudicial effect of such remarks and conduct; (3) that defendant's counsel should not be held to the disagreeable duty of unnecessary personal wrangle with the judge on his personal digressions.

COCHRAN V. PEOPLE.

175 Ill. 28—51 N. E. Rep. 845.

Opinion filed October 24, 1898.

INDICTMENT: When language of statute is insufficient—Uncorroborated testimony of accomplices.

1. Uncorroborated testimony of accomplices is insufficient to sustain a conviction.
2. An indictment under section 3 of division 1 of the Criminal Code (Rev. Stat. 1874, p. 352), for procuring an abortion by means of an instrument the name of which is unknown to the grand jurors, must particularly describe the manner in which such instrument was used.
3. Section 6 of division 11 of the Criminal Code, which makes an indictment technically sufficient which charges the offense in the language of the statute, does not apply where the statute so fails to describe the offense that the use of the statutory language will not apprise defendant of the real offense with which he is charged.

MAGRUDER, J., dissenting.

Writ of error to the Circuit Court of Cumberland County; the Hon. Frank K. Dunn, Judge, presiding.

At the August term, 1897, of the circuit court of Cumberland county, the grand jury returned an indictment of two counts against the plaintiff in error, charging him with the crime of producing an abortion. At the following February term, 1898, he appeared before the court and entered a motion to quash the indictment and each count thereof, which was overruled. He then entered his plea of not guilty, and a trial was had resulting in a verdict of guilty "of an attempt to procure an abortion," and upon this verdict the court, after overruling a motion for a new trial, sentenced him to the penitentiary.

The first count of the indictment charges "that Dr. Charles G. Cochran, late of the county of Cumberland and State of Illinois, on the 18th day of November, 1896, at and in the county aforesaid, did unlawfully and feloniously administer and use on one Stella Roberts, then and there being a woman pregnant with child, a certain instrument, the name of which is to the grand jurors unknown, with the intent then and there to produce an abortion and miscarriage of the said Stella Roberts, and then and there did thereby unlawfully and feloniously cause the miscarriage of the said Stella Roberts, it not being then and there necessary to cause such miscarriage for the preservation of the life of the said Stella Roberts, the said Charles G. Cochran then and there well knowing that the said instrument would produce such miscarriage, and by reason of such miscarriage she, the said Stella Roberts, then and there died," etc. The second count is substantially the same.

The only evidence of the defendant's guilt was the testimony of David Wickham, a confessed accomplice and guilty of the girl's pregnancy, who admitted on the witness stand that he had been promised immunity from punishment if he would testify in the case, and who was wholly uncorroborated. He testified, in substance, that he took Stella Roberts from her home in Hutton township, Coles county, to the defendant's house in Hazel Dell—a village in the southeast corner of Cumberland county,—on the 18th day of November, 1896; that he had never been there before and did not know the doctor, but that the girl told him where to go; that he there "had a slight talk with him,"

the result of which was that he drove with the girl to a certain place designated by the doctor, some three miles northwest of the village, where the defendant met them and took the girl from the buggy to a fallen tree-top, a short distance from where the witness remained with the buggy; that he saw the girl lying on her back, the doctor being down at her feet, and that he saw him take out of his valise some bright instrument; that shortly afterwards they came back to the buggy, where he paid the doctor \$20 and then took the girl back to Casey, in Clark county, and from there to her home. He does not state the distance between Hazel Dell and Hutton township, Coles county, where Stella Roberts lived, but it must be from fifteen to twenty miles. He does not say he saw any use whatever made of the instrument, or that the girl manifested any indication of pain or other symptom of having been operated upon, but, on the contrary, says she never complained to him, and when he reached her grandparent's house, about nine o'clock that night, she made no complaint,—or words to that effect.

The defendant testified, in his own behalf, that he resided in Hazel Dell, where he had lived twenty-five years, and was a practicing physician at that place. He denied in the most emphatic terms that he knew or had ever seen Stella Roberts, or produced, in any way or manner, an abortion upon her, or attempted to do so, or that he had ever seen the prosecuting witness, Wickham, prior to his indictment. The evidence of Wickham is contradicted as to the time he and Stella Roberts were at the defendant's house on the 18th of November, several witnesses testifying to facts tending to show that at that hour the doctor was not at his house, but some distance in the country, visiting patients. There was some evidence that defendant had theretofore sustained a good reputation in the neighborhood and vicinity in which he lived, but that subject was not gone into very fully.

Stella Roberts died at her grandparent's house, in Coles county, about November 23, from the effects of an abortion. Her attending physician, Dr. Franklin, testified that the abortion was produced by taking medicine, though this statement was based simply upon what the patient told him, and his smelling upon her breath the odor of turpentine, camphor and

oil of tansy, all of which, he testified, are abortives. There was other testimony offered upon the trial which tended to corroborate the defendant and contradict the prosecuting witness.

Among the grounds urged for a new trial was that of newly discovered evidence, supported by affidavits stating facts strongly tending to prove the defendant's innocence and contradict the prosecuting witness, Wickham.

This writ of error has been made a *supersedeas*, and a reversal of the judgment of sentence entered by the court below is insisted upon on several grounds. Reversed.

L. N. Brewer and *Everhart & Decius*, for plaintiff in error.
Smith Misner, State's Attorney, and *E. N. Rinchart*, for the People.

MR. JUSTICE WILKIN delivered the opinion of the court.

We are unable to see how the jury, upon the evidence as it is presented to us, could reach the conclusion that there was no reasonable doubt of the guilt of the plaintiff in error. In *Hoyt v. People*, 140 Ill. 588, 30 N. E. Rep. 315, and *Campbell v. People*, 159 Ill. 9, 42 N. E. Rep. 123, the defendants were each found guilty on the uncorroborated testimony of accomplices, and the judgments of conviction were reversed on the ground that the evidence was insufficient to sustain the verdicts. What was said in those cases as to the credibility of such testimony applies with at least equal force to the evidence of David Wickham in this record.

The newly-discovered evidence, as shown by the affidavits filed, was very important to the defendant, but it was cumulative in its nature, and perhaps not of that conclusive character which would demand the granting of a new trial.

The statute under which the prosecution was had is section 3 of division 1 of the Criminal Code, as follows: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the

death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder."

In our opinion, the indictment is wholly insufficient, under the foregoing statute, to sustain the conviction, and the court erred in refusing to quash it, and also in refusing to sustain the defendant's motion in arrest of judgment. Both counts attempt to charge that the offense was committed with an instrument. The first count says, "did . . . administer and use on one Stella Roberts . . . a certain instrument." The second count avers, "did . . . use on and administer to one Stella Roberts," etc. No attempt whatever is made, in either count, to state how or in what manner the instrument was used "or administered." Whether it was done "by forcing, thrusting, and inserting said instrument into the private parts," as was alleged in the indictments in *Baker v. People*, 105 Ill. 452, and *Scott v. People*, 141 Ill. 195, 30 N. E. Rep. 329, or in some other manner, is wholly left to inference. If the evidence produced on the trial on this subject proves anything, it tends to show that some instrument was used by thrusting, etc., in the private parts of Stella Roberts; but no one will seriously contend that, under the allegations of the indictment, the use of an instrument with the intention of producing an abortion, in any other manner, would not have been equally admissible.

The only attempt to justify this departure from well-understood rules of criminal pleading is the contention that, being a statutory offense, the indictment is sufficient as charging it in the terms and language of the statute, or so plain that the nature of the offense might be easily understood by the jury; relying upon section 6 of division 11 of the Criminal Code. It is true that under this section of the statute it is generally sufficient to state a statutory offense in the terms and language of the statute; but there are well-understood exceptions to the rule. Where the language of the statute describes the act or acts constituting the offense, no more is necessary than to state the offense in that language, as where the offense is having in possession instruments used in counterfeiting coin. In an indictment for that offense it was held sufficient to allege that the defendant had in his possession, knowingly and without lawful excuse, certain instruments and tools used in counterfeiting the

coin current in this State, being in conformity to the definition of the crime in the Criminal Code. There the act constituting the offense was having in possession, etc., no matter by what means possession was obtained. And so in *Loehr v. People*, 132 Ill. 504, 24 N. E. Rep. 68, the indictment being for defacing and altering a book, the language of the statute being, "if any judge, . . . or any person whatever, shall . . . alter, corrupt, withdraw, falsify or avoid any record, . . . the person so offending shall be imprisoned in the penitentiary not less than one nor more than seven years," it was held sufficient to state the offense in the language of the statute, without specifying particularly how the alteration was made. Here, again, the offense consisted in the act of defacing or altering, no matter by what means or how it was done; and so as to the cases there cited and many others relied upon by counsel for the People as sustaining this indictment. In another class of cases, where the act constituting the offense is committed by means of doing certain things, such as obtaining money by means of a confidence game, it has been held sufficient to charge that the accused did unlawfully and feloniously obtain "money by means and by use of the confidence game." These cases, however, are based either upon the express provision of the statute that it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., "unlawfully and feloniously obtain, or attempt to obtain (as the case may be), from A. B. his money, *by means and use of the confidence game*," or upon the theory that the term "confidence game" has a well-understood meaning, the use of which in an indictment sufficiently apprises the accused of what he is called upon to defend. *Morton v. People*, 47 Ill. 468; *Maxwell v. People*, 158 Ill. 248, 41 N. E. Rep. 995.

We said, however, in *Johnson v. People*, 113 Ill. 99 (on page 102): "No principle of criminal pleading is better settled than that an indictment for a mere statutory offense must be framed upon the statute, and that this fact must distinctly appear upon the face of the indictment itself. That it shall so appear, the pleader must either charge the offense in the language of the act or specifically set forth the facts constituting the same. It sometimes happens, however, that the language of a statute

creating a new offense does not describe the act or acts constituting such offense. In that case the pleader is bound to set them forth specifically. This elementary rule is laid down in all standard works on criminal law, and is fully recognized by this court. 1 Wharton on Crim. Law, secs. 164-372; *Kibs v. People*, 81 Ill. 599." And in Wharton on Criminal Pleading and Practice (sec. 220), it is said: "On the principles of common-law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute in all cases where the statute so far *individuates* the offense that the offender has notice, from the mere adoption of the statutory term, what the offense he is to be tried for really is, but in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant on trial without a specification of the offense, than it would be under a common-law charge."

In *West v. People*, 137 Ill. 189, 27 N. E. Rep. 34, and 34 N. E. Rep. 254, will be found a citation of authorities to the effect that the constitutional provision (section 9 of article 2), providing that in all criminal prosecutions the accused shall have the right "to demand the nature and cause of the accusation" against him, is for the purpose of securing to him such specific designation of the offense laid to his charge as will enable him to prepare fully for his defense, and plead the judgment in bar of a subsequent prosecution for the same offense.

The manner in which the offense defined in section 3 of division 1 of the Criminal Code may be committed is "by means of any instrument, medicine, drug or other means." The act of using an instrument is in no way described. The language, "by means" of any instrument, is broad enough to include any and every means by which an instrument could be used for the purpose of causing an abortion. It is therefore clear that, in order to make a good indictment against one for the commission of a crime by means of an instrument, as is said in *Johnson v. People, supra*, the "pleader is bound to set forth the acts specifically;" that is, state with reasonable certainty the manner in which the act was committed. Furthermore, it is not true that this indictment charges the offense in the terms and language of the statute, as will be readily seen by comparing

the statements therein made with section 3, *supra*. Just what is meant by "administering" an instrument to a person it is difficult to understand; and, as we have said, the general statement that an instrument was used upon a person gives no indication of the manner in which it was used. A jury might conjecture or imagine from the allegations the nature of the offense with which the defendant is charged, but it cannot be said that it is so plainly alleged that it could be easily understood either by him or the jury.

In our opinion, to sustain this indictment would be to substantially lay down the rule that any indictment is sufficient which amounts to an accusation of the commission of a crime. It is not intended to announce any rule which will render nugatory the provision of section 6 of division 11 of the Criminal Code, wisely intended to simplify criminal pleading and dispense with many technical and useless averments heretofore required in indictments; but we are not prepared to hold that a defendant indicted, under a statute of this kind, for a most serious offense, is not fairly entitled to notice, by statements in the indictment, as to the act or acts with which he is charged in the commission of the offense. We have carefully sought for some precedent or authority which could fairly be said to sustain this indictment, and have been wholly unable to find one. We are not willing to establish the precedent by this decision, and accordingly hold that the indictment, and each count thereof, is fatally defective. The judgment of the circuit court will be reversed, and the cause will be remanded. Reversed and remanded.

MR. JUSTICE MAGRUDER dissenting.

NOTES.—INDICTMENTS FOR STATUTORY OFFENSES (by J. F. G.).—*Illinois Cases*: There are two irreconcilable lines of decisions in Illinois upon this subject; the conflict being as to the construction of section 408 of the Criminal Code, which reads as follows: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." In several of the cases the court has followed the letter of the statute; while in better considered cases the rule announced in *Cochran v. People* has been followed.

In *Cochran v. People* the court quotes with approval the following from *Johnson v. People*: "It sometimes happens, however, that the language of a statute creating a new offense does not describe the act or acts constituting such offense. In that case the pleader is bound to set them forth specifically. This elementary rule is laid down in all standard works on criminal law, and is fully recognized by this court." While following the correct doctrine, the court makes an ineffectual effort to reconcile it with the decisions in *Morton v. People*, 47 Ill. 468, and *Maxwell v. People*, 158 Ill. 248, 41 N. E. Rep. 995, by suggesting that the indictments in those cases were sustained either on the proposition that there was an express statute governing the form of the indictment, "or upon the theory that the term 'confidence game' has a well-understood meaning, the use of which in an indictment sufficiently apprises the accused of what he is called upon to defend." This theory is refuted by the opinion in the *Maxwell Case*, where the court, referring to the phrase "commonly called the confidence game," says: "These words imply that the statute was intended to embrace *any other means*, instrument or device, besides the use of false or bogus checks, which comes within the meaning of what is commonly called the confidence game." In the *Morton Case* the court said: "Now, as these devices are as various as the mind of man is suggestive, it would be impossible for the legislature to define them, and equally so to specify them in an indictment; therefore the legislature has declared that an indictment for this offense shall be sufficient if the allegation is contained in it that the accused did, at a certain time and place, unlawfully and feloniously obtain or attempt to obtain the money or property of another by means and by use of the confidence game, leaving to be made out by the proof the nature and kind of the devices to which resort was had." Following this language, the court proceeds on the theory that pleading a statutory offense in the language of the statute is sufficient, citing *Miller v. People*, 2 Scam. 233, and *Kennedy v. People*, 17 Ill. 158. The *Morton Case* is certainly overruled on the last proposition, and should be on the proposition that a statute can nullify an express provision of the constitution, giving to the accused the right "to demand the nature and cause of the accusation against him." (*State v. Couch*, and notes, in present volume.)

In *Prichard v. People*, 149 Ill. 50, 36 N. E. Rep. 103, the court held that the above-cited section did not abrogate the common-law rule of pleading, as applied to indictments, and held that: "It is an elementary rule of pleading, both civil and criminal, that allegations of fact in pleadings should be direct and positive, and not merely argumentative and inferential;" and that "whether the description of the offense is so plain that its nature can easily be understood by the jury must depend upon whether it is described with at least a reasonable degree of certainty, using the term 'certainty' in its common-law sense."

In *McNair v. People*, 89 Ill. 441, the indictment under consideration contained three counts. In the first count it was charged that the defendant "unlawfully caused to be printed a certain obscene and in-

decent pamphlet, with intent to give the same away." In the second count it was charged that he "unlawfully did have in his possession, with intent to give away, a certain obscene and indecent pamphlet, purporting to be evidence taken before a committee appointed by the Fox River Valley Medical Association, in the matter of charges against O. L. Pelton, referred by Dr. McNair." In the third count it was charged that he "unlawfully did give away a certain obscene and indecent pamphlet, then and there thereby circulating the same." The court held that while the section of the statutes relating to indictments is broad and comprehensive, "It was necessary to set out the supposed obscene matter in the indictment, unless the obscene publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment, as an excuse for failing to set out the obscene matter; that whether obscene or not, is a question of law, and not of fact; that the question is for the court to determine, and not for the jury." The court further said: "The averments would apply equally well to any one of many pamphlets. They give no notice of any particular charge. These can, under no construction of this section, be held sufficient." The judgment was reversed upon that question alone. The *McNair Case* is supported by the noted case of *Bradlaugh v. Queen*, 3 Am. Crim. Rep. 470, 3 Q. B. Div. 607, where the subject is extensively reviewed.

In *Rank v. People*, 80 Ill. App. 40, the indictment was based upon a statute which provided as follows: "Whoever, either verbally or by written or printed communication, maliciously threatens to accuse another of a crime or misdemeanor, or to expose or publish any of his infirmities or failings, with extent to extort money," etc. The indictment charged that the defendant, "unlawfully and wilfully did then and there, to one John H. Anderson, verbally and maliciously threaten to accuse the said John H. Anderson of a certain misdemeanor, to wit, selling intoxicating liquors without then and there having a legal license to keep a dram-shop, with intent to extort money from the said John H. Anderson," etc. In reversing the conviction the court held that the indictment was insufficient in that the language, "threaten to accuse the said John A. Anderson of a misdemeanor," is merely a conclusion; and that the supposed misdemeanor was not sufficiently described, in that it is no offense under the statute to sell intoxicating liquors without a license in greater quantities than one gallon, unless to be drank on or about the premises, etc.; hence the indictment did not charge that the accused had threatened to accuse Anderson with any known misdemeanor. The court cites as sustaining its conclusion *McNair v. People*, 89 Ill. 411; *Johnson v. People*, 113 Ill. 99; *Hunter v. People*, 149 Ill. 50; *Hunter v. People*, 50 Ill. App. 367; *Williams v. People*, 101 Ill. 382; *Thompson v. People*, 96 Ill. 158.

In *Towne v. People*, 89 Ill. App. 258, three counts of the indictment charging the accused with conspiracy, in the language of the statute, were held insufficient. Among the authorities cited to sustain that contention was *Cochran v. People*, *supra*.

The doctrine as announced by the Supreme Court of the United States.—In *United States v. Carl*, 105 U. S. 611, 4 Am. Crim. Rep. 246, the court said: "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves, fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." See also *Pettibone v. United States*, 148 U. S. 197; *United States v. Hess*, 124 U. S. 483; *United States v. Britton*, 108 U. S. 199; *United States v. Hirsch*, 100 U. S. 33; *United States v. Simmons*, 96 U. S. 360; *United States v. Cruikshank*, 92 U. S. 542.

Decisions in various States.—In *State v. Gabriel*, 88 Mo. 631, on page 642, the court says: "The rule is that, where the indictment is based upon a statute creating the offense, an offense unknown to the common law, the indictment must set forth all the constituent facts and circumstances necessary to bring the accused perfectly within the statutory provisions;" citing *People v. Allen*, 5 Denio, 76; 1 Arch. Crim. Pr. & Pl. 282, note 1; *Hall v. State*, 3 Cold. 125; *Bishop on Stat. Crimes*, secs. 418, 421, 422.

In Massachusetts an act was entitled: "An act more effectually to protect the sepulchres of the dead, and to legalize the study of anatomy in certain cases." The act contained the following: "That if any person, not being authorized by the board of health, etc., shall knowingly or wilfully dig up, remove, or convey away, or aid and assist in digging up, removing, or conveying away, any human body, or the remains thereof," such person shall be adjudged guilty of felony. In *Commonwealth v. Slack*, 19 Pick. 304, the indictment charged that the defendants "did unlawfully, feloniously, knowingly and wilfully remove and convey away from the said town of Westhampton a certain human body, to wit, the body of Ibrook Miller, who had deceased at said Westhampton previous to the said removing and conveying away aforesaid, they, the said William Slack and Joseph Kingsley, not being authorized by the board of health or overseers of the poor or the selectmen of said town of Westhampton." In holding this indictment bad the court said: "The literal construction of this clause of the statute would seem to prohibit the removal of any dead body for any purpose whatever, but such a construction would render a person criminal for removing a dead body for the purpose of interment, without obtaining a license therefor from the overseers of the poor or selectmen, which it is impossible to suppose could have been the intention of the legislature." In accordance with this conclusion the court said: "The indictment, therefore, should have set out precisely all the facts and circumstances which render the defendant guilty of the offense charged."

In *Brown v. State*, 76 Ind. 85, the indictment under consideration was for malicious trespass, and charged that the defendant did "then

and there unlawfully, maliciously and mischievously injure, and cause to be injured, a certain window, window blind and sewing machine, all the property of Nathaniel W. Phipps, by then and there wrongfully, maliciously and mischievously throwing a stone, and stones, at and against and through the said window and window blind, and at and against said sewing machine, to the damage of the said Nathaniel Phipps in the sum of nine dollars and forty cents." The indictment was held insufficient in that nothing at all was alleged as to the injury, "whether defaced, broken or destroyed." The court based its decision upon the fact that "the accused ought to be confronted with a statement of the kind and character of the injury, for the measure of punishment depends upon the extent and character of the injury done to the property." The indictment should have shown, for example, "that the window was broken, or that the sewing machine was broken or defaced."

In *State v. Costello*, 62 Conn. 128, 25 Atl. Rep. 477, the complaint under consideration charged that the accused "did wilfully injure a public building and house of worship situated," etc. The court said: "It has been stated in many cases that in an information for a statutory offense it is sufficient to allege it in the words of the statute. But such statement is never intended to be a relaxation of the general rule as above given, because in all cases the offense must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. Ordinarily it is sufficient to charge a statutory offense in the words of the statute. But when the words of a statute by their generality may embrace cases falling within its literal terms which are not within its meaning and spirit, or where from the nature of the offense the words used of the statute do not clearly and definitely apprise the accused of the offense charged against him, then greater particularity must be used." In applying this doctrine the court suggested that the injury alleged might be done in almost an indefinite number of ways, such as cutting the back of a pew with a knife, or picking the lock of the door, or blowing up the building with dynamite, or any method causing injury between these extremes. The judgment of the court below was reversed.

As to indictments for malicious mischief, see also *Lightfoot v. State*, reported in the present volume.

For an extended review of this subject, *Sullivan v. State*, 67 Miss. 346, 7 So. Rep. 275, 12 Crim. Law Mag. 498, is a valuable authority. In that case John L. Sullivan was charged with engaging in a prize fight with Jake Kilrain, the indictment charging that it was done by a previous arrangement, and for a large sum of money, and that he did "unlawfully engage in a prize fight with the said Jake Kilrain, to wit, did then and there enter a ring commonly called a prize ring, beat, strike and bruise the said Jake Kilrain," etc. The court said: "The statute neither defines the offense of prize fighting nor declares what act shall be a violation of the provision. The specific offense was unknown to the common law, the participants in such case being only punishable for affray, riot, or assault and battery, according to the circumstances." The court held that as the term "prize fight"

refers to a public exhibition, and that as "the evil sought to be protected against by the statute is the debasing and brutalizing practice of fighting in public places, or places to which the public or some part of it is admitted as spectators," that "it is not sufficient to indict by the use of the statutory words only, but the facts which, if proved, show him to be guilty of a statutory offense must be charged."

Upon this subject see also *Packard's Case*, 4 Oreg. 189; *Perham's Case*, 4 Oreg. 188; *State v. Hill*, 79 N. C. 657; *State v. Philbrick*, 31 Me. 435; *Commonwealth v. Cook*, 13 B. Mon. (Ky.) 149; *Jewell v. Territory*, 4 Okl. 53; *Commonwealth v. Hunt*, 4 Met. 111; *State v. Parker*, 43 N. H. 83; *State v. Keach*, 40 Vt. 113, and the subject "Indictments" in the index of 10 American Criminal Reports, where reference is made to numerous authorities in that and the nine previous volumes.

See also *Appleby v. State*, 63 N. J. 526 (1899), 42 Atl. Rep. 847, a strong opinion, a note of which is to be found in this volume, *ante*, among notes under the head of "False Pretenses."

MERRITT V. STATE.

39 Tex. Crim. Rep. 70—45 S. W. Rep. 21.

Decided March 16, 1898.

INSANITY: DELUSIONS: HOMICIDE: *Evidence—Wife as a witness—Extraneous matters—Defective instructions.*

1. Certain evidence, not important, held to be part of the *res gesta*.
2. Where, on cross-examination by the defense, it was sought to show that a witness was one who sought with others to get up a mob to mob defendant, it was not error to allow him to state on re-examination that he was opposed to mob law.
3. Evidence of a justice of a peace, that seven or eight years before the homicide the defendant's wife made complaint before him that defendant had assaulted her, was incompetent and prejudicial.
4. Where defendant's wife was introduced as a witness for certain purposes, it was error to allow the prosecution to cross-examine her as to matters not germane to her examination in chief. It was not allowable thus to draw out matters prejudicial to the defendant, or to lay a foundation to impeach her evidence.
5. It was error to allow a deputy sheriff to give his opinion that defendant was sane, based upon hearing him testify previously in another case.
6. It was allowable for a neighbor of defendant, under the "peculiar circumstances" of the case, to testify on cross-examination that he had never heard of defendant's insanity until after the homicide.
7. Where it was shown by a number of witnesses that for several years defendant had told many persons, in an intensely excited

mood, that a mob was after him to kill him, it was error not to permit such witnesses to testify that defendant said that Brown, the deceased, was at the head of the mob. This action of the trial court kept from the jury the most vital part of the evidence, concerning his fear and delusions as to a mob, and tended to greatly depreciate in importance the evidence admitted.

8. A witness who had been defendant's family physician for ten years, but who had only seen him once or twice in six years, was competent as an expert, although the value of his opinion might be tested by a fuller examination.
9. It is settled that a delusion is a form of insanity. One may be afflicted with "monomania"—insane on one topic, but sane on all other topics. It is not necessary that this delusion be confined to a delusive belief of a fact which, if true, would afford a justification; but if the mind of the person was so impaired by the delusion as not to be able to discern the right or wrong of the particular act, and he was induced to commit the act by the delusion, such act is not criminal.
10. The evidence tended to show that defendant was overwhelmed by an insane delusion that Brown, the deceased, was the leader of a mob that was seeking his life, and as a consequence thereof he killed Brown, and the instructions should have fully covered the evidence and correctly applied the law, which was not done. The jury should have been instructed that, if they believed that defendant killed Brown while possessed of such insane delusion, believing at the time that by taking Brown's life he was preserving his own, he should be acquitted.

J. W. Merritt, convicted of murder in the second degree, in the Parker District Court, Hon. J. W. Patterson, Judge, appeals. Reversed.

F. L. Hutchison and Henry W. Kuteman, for the appellant.
Mann Trice, Asst. Atty. Gen., *H. B. Hood*, Co. Atty., *Albert Stevenson* and *Nat. P. Jackson*, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

In appellant's first bill of exceptions he complains that the court acted improperly in admitting the testimony of T. F. Harrison, to the effect that, just before the killing, Joe Brown was over with him on the platform at Millsap, and went from there over to the blacksmith shop, and, in connection with his going, stated that he said he was going from there either to get some

water or draw some water, witness was not certain which. The objection urged to this testimony was that the statement was made in the absence of the defendant. In our opinion what he said at the time of going over to the shop was a part of the *res gestæ* of that act, and was admissible. But, if it be conceded that it was not, we fail to see how its admission could injure the appellant. There is no pretense anywhere in the record that deceased was pursuing Merritt or seeking an encounter with him. Nor is there any pretense that he went over to said shop for any other than an innocent purpose.

We also believe that it was admissible to show on the re-examination of the witness Harrison by the State that he was opposed to mob law, and had always used his influence to prevent mobs. This was in rebuttal of the attempt to show by this witness, on his cross-examination by the defendant, that he was one of a party who had undertaken to get up a mob to mob the defendant.

We fail to see how it was admissible to prove by the witness McCall that defendant's wife, seven or eight years before the homicide, had made complaint before him as a justice of the peace, in which she charged her husband with making an assault on her. There was nothing in the case that rendered this testimony admissible, and it was of a character to prejudice appellant's case before the jury.

Under the peculiar circumstances of this case, in our opinion it was admissible to prove, on cross-examination by the State of the witness J. R. Hollified, "that he had never heard of defendant being insane until after the homicide." There was a great deal of testimony introduced by the defendant tending to show that appellant was insane, and that this insanity was of long standing. The witness Hollified was a near neighbor of the appellant, and it was competent to show by him that he had never heard of the defendant being insane until after the homicide, as tending to show on the part of the State that the defense relied on was of recent fabrication and origin.

By bills of exception numbers 8, 9, 11, 12, 13, and part of 15, appellant presents the question as to the competency of evidence to show that Joe Brown was regarded by the defendant as being at the head of a mob to kill him. This testimony was offered by

appellant, in connection with other testimony from a number of witnesses, tending to show his insanity; that such insanity was in the shape of a delusion that a mob was after him to kill him, and that Joe Brown was at the head of the mob. It extended over a number of years, and these bills of exception show that proof was made on a number of occasions that appellant talked to them (witnesses) about a mob being after him, and on such occasions he became intensely excited and beside himself, and that they pronounced him insane on the subject of believing that a mob was seeking his life. In connection with their testimony as to his conversation about the mob being after him, and his conduct and condition on such occasions, it was offered to be proved by them that he stated that Joe Brown was at the head of the mob, and that he was at the bottom of the attempt to mob him. As a specimen of this character of testimony, we will quote from bill of exceptions No. 13 as follows: "While the witness Jasper N. Haney was on the stand, after he had testified that he had known defendant for several years, and that he had received a letter about two months before the homicide from defendant requesting him to send up a United States marshal, that he was about to be mobbed, and that four or five days after said letter was received defendant rushed into his (witness') law office, greatly excited, and stated a mob was after him, and that they were going to kill him (defendant), and asked for protection; and after said witness had testified that in his opinion defendant was not sane on the question of a mob, and that he would kill any one he fancied connected therewith, and would not know it was wrong,—counsel for defendant offered to prove by said witness that when defendant rushed into his office as above stated, and in the same conversation above stated, the defendant claimed that Joe Brown, deceased, was the leader of the mob, and had organized it for the purpose of killing him." This testimony, in which the witness named Joe Brown as the leader of the mob, was excluded; and it will be seen, going through the statement of facts, that the court permitted the witnesses to testify as to all the facts of these conversations, leaving out the name of Joe Brown as the leader of the mob, merely referring to the leader of the mob as "a certain person." It has long been recognized that a delusion is a form

of insanity. It is sometimes called "monomania;" that is, the subject may be sane on every other topic, but insane on some particular topic. Of course, it denotes an impairment or disease of the mental faculties which may more or less affect the mind generally. We quote from Mr. Wharton on this subject (1 Whart. Cr. Law, sec. 37): "The answer of the English judges on the special topic of delusion is as follows: 'The answer must, of course, depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.' To the same effect speaks Chief Justice Shaw: 'Monomania may operate as an excuse for a criminal act' when 'the delusion is such that the person under its influence has a real and firm belief of some fact not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defense. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive, but sincere, belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature.' " We gather from the authorities that a delusion need not be confined, as was formerly held, to the delusive belief of a fact which, if true, would afford a justification. But if the delusion was of such a character as to impair the mind of the person possessed thereof, to such an extent that the person was not able to discern the right or wrong of the particular act he was doing, and was induced to commit the particular act by the delusion, he would not be a criminal. Mr. Bishop, after stating the rule about as Mr. Wharton does, *supra*,

uses this language: "This branch of the doctrine should be cautiously received, for delusion of any kind is strongly indicative of a generally diseased mind, and, doubtless sometimes, if not always, does in fact extend beyond the precise point we have supposed, whether perceptible to the casual eye or not." And he then proceeds to quote from *Hadfield's Cases*. See 1 Bish. New Cr. Law, secs. 393, 394. See, also, Busw. on Insan., secs. 429, 430. Now, if delusion is a feature of insanity, and if a person overcome with such delusion does an act while under its influence for which the law would not hold him amenable, it is important that the exact facts and conditions and moving cause to such delusion be proved. The delusion of appellant in this case was not solely that appellant believed a mob was in pursuit of him, but that that mob was led on by a particular individual,—Brown, the deceased. If Brown did belong to the mob, there would be much greater reason afforded why, under the spell of the delusion, appellant should have slain him. If, according to appellant's conception, Brown did belong to the mob, much more, if he were the leader of same, would it appear that appellant's act in slaying Brown was the result of his insane delusion. The court, however, seems to have concluded that the insane delusion could be proved, and a most important feature omitted therefrom. That is, according to the court's idea, it was entirely competent to prove that appellant was deluded as to a mob in pursuit of his life, but it could not be shown in connection therewith who composed the mob. In the view we take of this question, we fail to see of what avail all the proof offered by appellant concerning the mob in pursuit of his life would be to him, if he was not permitted to show who composed that mob. The very essence of appellant's delusion was that the mob was led on by the deceased, if he, indeed, was not the entire mob, and that under such belief he slew him; yet we have seen from the bills of exception above stated that appellant was denied this proof. In our opinion, this was material error on the part of the court.

Appellant, by his bill of exceptions No. 14, shows that he introduced his wife and proved certain facts by her. The bill further shows that on cross-examination the State was permitted to show other and different facts, not germane or per-

tinent to those elicited on direct examination. Some of these facts elicited on cross-examination were of a damaging character, and calculated to greatly prejudice appellant before the jury. This was independent testimony, and the use of the wife as a witness against the husband, which was not admissible. See *Jones v. State*, 38 Tex. Crim. Rep. 87, 40 S. W. Rep. 807; *Gaines v. State*, 38 Tex. Crim. Rep. 202, 42 S. W. Rep. 385, and authorities cited. Nor was it permissible to lay the predicate by the wife of appellant as to matters about which she could not be cross-examined, in order to impeach her.

We believe that it was competent to impeach the witness White by showing that he had been indicted for forgery.

By bill of exceptions No. 21 appellant objected to the testimony of Dr. Withers as an expert as to the sanity of appellant. The bill shows that Dr. Withers had been the family physician of defendant up to the year 1891, a period of ten years; that he had only seen appellant since that time once or twice, and then only casually. On this general statement he was permitted to give his opinion as to the sanity of appellant. We take it that the bill sufficiently shows an acquaintance and knowledge on the part of the witness to testify on that subject, but by a fuller examination of the witness on this subject the difficulty will no doubt be obviated.

We do not believe that it was competent for the deputy sheriff, McConnell, to testify that he heard the defendant testify in a certain case tried a few weeks before, and in that case he testified like a sane man.

No exception was reserved to the charge of the court on insanity, but, in view of another trial, we would observe that the charge of the court on this subject may be well enough as far as it goes, but it does not apply the law to the facts of the case. We think that the court should give the jury a charge on insanity as applicable to the facts proved. In this case appellant's proof tended to show that he was overwhelmed at the time of the homicide with an insane delusion that deceased was the leader of a mob that was seeking his life. If he was insane on that subject, and if, under that delusion, he was incapable of distinguishing between right and wrong of the particular act he was doing, and he believed that in slaying Brown he was

preserving his own life from the mob, then he was not criminally responsible, and the jury should be instructed, if they believe the homicide occurred under such circumstances, to acquit him.

The judgment is reversed and the cause remanded.

FLANAGAN v. STATE.

103 Ga. 619—30 S. E. Rep. 550.

Decided March 22, 1898.

DELUSIONAL INSANITY: PARANOIA: HOMICIDE: *Irresistible insane impulse—Practice on special issues of insanity—Sound common-law discretion of the court on suggestions of insanity—Evidence—Instructions.*

1. No person indicted for crime can, under sections 951 and 953 of the Penal Code, as matter of right, demand more than one trial upon a special plea of insanity at the time of trial. If, after such a plea has been found against the person, the trial in chief has been postponed, it would be a matter within the sound discretion of the judge whether or not another preliminary investigation upon the question of insanity at the trial should be had, and, if so, to what extent and in what manner the same should be conducted.
2. An exception to the general and well-settled rule that one is criminally responsible who had sufficient reason to distinguish between right and wrong, as to a particular act committed by him, exists in a case where it appears that, though the accused had such knowledge, his will, in consequence of some delusion brought about by mental disease, was overmastered, so that there was no criminal intent as to the act in question, and when it also appears that this identical act was connected with the peculiar delusion under which the accused was laboring.
3. Under the evidence introduced in the trial of the present case, it was erroneous not to give in charge to the jury the written request embodying the principle above announced, the same not being covered in the court's general charge to the jury.
4. Where the defense relied upon in a trial for murder was irresponsibility arising from insanity at the time of the homicide, any evidence tending to show the real mental condition of the accused at the time is relevant, and his acts both before and after the homicide may be proved as tending to throw light upon the question thus put in issue. Accordingly, it was not erroneous to allow the State to introduce in evidence an affidavit sworn to and subscribed by the accused himself, at a previous term, for the pur-

pose of obtaining a continuance, the probative value and effect of such evidence being a matter solely for the determination of the jury.

5. Save as stated in the third headnote, the record discloses no sufficient cause for ordering a new trial in this case; the charge of the court, with the exception above referred to, fairly presented to the jury the questions in issue; and the exceptions to its relating to other matters are not meritorious. There was no material error in admitting or rejecting evidence. The foregoing covers all questions requiring special mention which arose at the last trial and are likely to arise at the next.

(Syllabus by the Court.)

Error to the De Kalb County Superior Court; Hon. J. S. Candler, Judge. Reversed.

Glenn & Rountree, for the plaintiff in error.

J. M. Terrell, Atty. Gen., and *W. T. Kimsey*, Solict. Gen.,
W. W. Braswell and *W. L. Wright*, for the State.

SIMMONS, C. J. Flanagan was indicted for the offense of murder. Upon his arraignment on the indictment, he filed a special plea of insanity, alleging that he was then insane. Under the provisions of the Penal Code, §§ 951, 953, a jury was selected to try the issue raised by this plea. After hearing the evidence, the argument of counsel, and the charge of the court, they returned a verdict finding that E. Flanagan was sane at that time. The case was then called for trial upon the merits, and the accused moved for a continuance, which was granted. More than two months thereafter, the case was again called for trial. Through his counsel the accused again filed a special plea of insanity, alleging that he was then insane, and could not, under the above sections of the Code, be forced to trial upon the merits until this second special plea was tried and determined. The State's counsel filed what they called a "special answer" to this second plea, wherein they set up the former trial upon a similar plea, and averred that the question of insanity at the time of trial was *res adjudicata*. Counsel for the accused demurred to this answer. The demurrer was overruled by the court, and the accused excepted. The trial then proceeded upon the merits. Flanagan was convicted of murder, and his motion for a new trial was overruled. The judgment overruling this motion was excepted to, and brought here for review.

1. One of the grounds of the motion for new trial alleged error in the trial judge in overruling the demurrer to the special answer of the State of the plea of "present insanity," above alluded to. The sections of the Code providing for this plea, and cited above, are as follows: "Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the asylum, there to remain until discharged in the manner prescribed by law." "No lunatic, or person afflicted with insanity, shall be tried, or put upon his trial, for any offense, during the time he is afflicted with such lunacy or insanity, which shall be tried in the manner hereinbefore pointed out where the plea of insanity at the time of the trial is filed, and, on being found true, the prisoner shall be disposed of in like manner." Counsel for the accused insisted that, under these sections, Flanagan could file this plea, and, as matter of right, demand that it be tried by a special jury, although it had once been so tried and determined against him. It was argued here in support of this contention that a person accused of crime had a right, under these sections, to file the plea of "present insanity" every time he was about to be tried, and that the trial judge had no discretion, but was compelled to impanel a jury to try this issue, regardless of the fact that he had tried it upon a former occasion. Were this true, it would be almost impossible to force the accused to a trial upon the merits of the case. As soon as one trial of such a special plea was ended by an adverse finding, and the case was again called for trial on the merits, the accused could again plead present insanity, and force the court to go over another trial of that issue, with possibly the same witnesses and the same evidence. If, in such second trial, the verdict should be against the plea, the accused could again file the same plea, and demand that it be again tried. We think that the legislature did not contemplate such a construction of the act embodied in these sections of the Code. The intention of the legislature, as we gather it from these sections and from the original act, was doubtless to give the accused the benefit of a jury trial, in order to ascertain whether he had sufficient mental capacity to understand the nature of

the proceedings against him, to realize his peril, and to assist his counsel in his defense, and that, if the jury determined that he had such mental capacity, the trial would proceed upon its merits. It was simply the separate trial of one issue of the case, and this one trial was all, in our opinion, that the act was intended to give as matter of right. When this is had, the statutory right of the accused under these sections is exhausted.

It is, however possible, and in some cases probable, that a person, sane at the time of the trial of the special issue, may, where his case is continued for any length of time, become insane to such an extent as to lack mental capacity to understand the nature of the proceedings against him, realize his peril, assist his counsel, etc. In such a case the accused would not be forced to trial upon the merits simply because a jury had, at a previous term of court, declared him then sane. His statutory rights under the Code sections above cited would have been exhausted, but resort could still be had to his common-law remedies. Under the common law, when a suggestion of insanity was made upon arraignment, the judge always investigated the case, and determined for himself whether the accused had sufficient mental capacity to go to trial. We think, therefore, that even after a jury had passed upon the plea of insanity at the time of trial, and had determined it against the accused, where it is suggested to the judge that since the time of such finding the mind of the accused had materially changed and that he is now in such a mental condition as that he should not be put upon trial, the judge should make the proper investigation to ascertain the truth of the suggestion. He may do this in any right and proper manner,—by impaneling another jury if he deem it best to do so, by considering the affidavits of experts, by a personal examination and inspection, or otherwise. In 1 Bishop's New Criminal Law, in the footnote to section 376, an account is given of the trial of Freeman, who was tried and convicted of murder. It appears from this account that Freeman upon arraignment had filed a plea similar to the special plea in the present case, and that it was found against him by the jury. Afterwards he was tried upon the merits of the case, and convicted. The Supreme Court granted a new trial. Mr. Bishop says: "Thereupon the judge of the higher court, who

was to preside at the new trial, visited the prisoner in jail, and, in consequence of what there appeared of his mental condition, refused to proceed with the trial." The man, he states, subsequently died in prison, indubitably insane. Under the Code sections above set out, we think that the accused has no statutory right to more than one jury trial upon the issue of insanity at the time of the trial; but, under his common-law rights, he can at all trials suggest to the trial judge his incapacity, by reason of mental weakness, to go to trial, and appeal to the discretion of the judge, just as may be done by a party to a civil action or by a person accused of crime when he is, by physical weakness or sickness, incapacitated for trial. If a person accused of crime is too ill to undergo trial at the time it is called, he may appeal to the court for a postponement or continuance. The court in such a case can investigate the illness for himself by an inspection of the accused, or, as is frequently done, by taking the opinions of experts upon the subject, and may grant or refuse the request in his discretion.

2, 3. On the trial upon the merits, counsel for Flanagan claimed that, although he committed the homicide, he was not guilty of any crime, because, by reason of a delusion under which he was laboring at the time of the killing, he was unable to form in his mind an intent to commit a crime. They claimed that he was laboring under a form of mental distress known as "paranoia" or delusional insanity; that a person afflicted with such mental disease has a delusion or delusions which dominate, but do not destroy, the mental capacity; and that, although the accused was sane as to other subjects, on that of the delusion and its direct consequences he was an insane man. They further contended that the delusion of this case was one known as the delusion of persecution, and that Flanagan, believing that he was being unjustly persecuted by persons, and that he was endeavoring to escape from his persecutors, and finding his escape cut off, and that there was nothing else to do but to slay his persecutors, proceeded to do so. They claimed that if all of these contentions were true and the accused acted under these delusions, he was not responsible for the killing. There was evidence sufficient to sustain the theory of delusion, and upon this evidence counsel for the accused requested the court, in

writing, to give the following charge to the jury: "Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a disease of the mind so as to be insane? If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible. If he did have such knowledge, he may nevertheless not be legally responsible, if the two following conditions concurred: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between right and wrong and to avoid doing the act in question, as that free agency was at the time destroyed. (2) And if at the same time the alleged crime was so connected with such mental disease in the relation of cause and effect as to have been the produce of it solely." The judge refused to give this request in charge to the jury, but charged generally the doctrine that one is mentally responsible who has sufficient reason to distinguish between right and wrong as to the particular act committed by him; and, on the subject of delusions, charged as follows: "If, in consequence of a delusion connected with the act in question, the will is overmastered and the reason is dethroned as to that particular act, there is no criminal intent as to that act, and hence no criminal responsibility for that act. But it is not every delusion of a man that would render one irresponsible; it must be such a delusion as is connected with the act in question, and must be such a delusion as overmasters the will and dethrones reason as to that particular act."

We think the court erred in refusing to give in charge the written request or its substance, and that he also erred in the charge he did give upon the subject. Courts, both in this country and in England, have for a long time differed as to the soundness of the doctrine of the request above set out, but this court has been committed to it for over fifty years. In the case of *Roberts v. State*, 3 Ga. 310, Nisbet, J., discusses the subject of insanity and delusions, in an exhaustive opinion. That case announced the following proposition as the law upon this question: "If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule, however, is, where a man has reason sufficient to distinguish be-

tween right and wrong as to a particular act about to be committed, yet, in consequence of *some delusion*, the will is overmastered and there is no criminal intent. Provided, that the act itself is *connected with* the peculiar delusion under which the prisoner is laboring." This case has never since been overruled, doubted or questioned by this court, but has been recognized and approved in the only two cases where the subject of delusions has been treated since that time. In the case of *Danforth v. State*, 75 Ga. 614, it appears that the trial judge followed it and that his charge was approved by this court. In the case of *Carr v. State*, 96 Ga. 284, the doctrine of the *Roberts Case* was again recognized by the court. There are numerous other cases in our reports which lay down the rule as announced in the first lines of the above quotation from the *Roberts Case*, but in none of them, so far as we now recollect, was the question made as to delusions. The right and wrong theory being the general test, it was not in those cases necessary to deal with the exception.

As before remarked, the doctrine of the *Roberts Case* was announced directly after this court was organized and has never since been questioned or doubted by this court. It is cited with approval in the leading works on criminal law and medical jurisprudence written in this country, and by many decisions of the different State courts. Its doctrine is the one which has been adopted generally by the modern text-writers on criminal law, and, we believe, by a majority of the State courts. Not only is this principle approved by all of these authorities, but we think it commends itself as being sound and reasonable. If a man has delusions produced by a disease of the mind, and by reason of those delusions his will is completely overmastered so that he has no power, even though he can distinguish between right and wrong, to adhere to the one or to avoid the other, he has not the capacity to form a criminal intent. A person afflicted with such a disease of the mind may know that a particular act is wrong and believe that he will be punished for it, and yet, if he is laboring under a delusion and his will is overpowered by an irresistible impulse which results from his peculiar delusion, he cannot be held criminally responsible for the commission of the act. Will is as necessary an element of intent as

are reason and judgment. On this subject see 1 Bishop's New Crim. Law, § 374 *et seq.*; 1 Wharton's Crim. Law, § 32 *et seq.*; Taylor's Med. Juris. (11th Am. ed.), 680, 686, 728, 729; *Parsons v. State*, 81 Ala. 577; *State v. Johnson*, 40 Conn. 136; *Macfarland's Trial*, 8 Abb. Pr. Rep. (N. S.) 57; *Commonwealth v. Rogers*, 7 Mete. (Mass.) 500; *Smith v. Commonwealth*, 1 Duv. (Ky.) 224; *Graham v. Commonwealth*, 16 B. Mon. (Ky.) 591 *et seq.*; *Commonwealth v. Haskel*, 2 Brewst. 490; *Dunn v. People*, 109 Ill. 635; *Sawyer v. State*, 35 Ind. 86; *State v. Felter*, 25 Iowa, 67; *Fouts v. State*, 4 G. Greene, 500; *State v. Pike*, 49 N. H. 441; *State v. Jones*, 50 N. H. 369; *Commonwealth v. Mosler*, 4 Pa. St. 264; *State v. Windsor*, 5 Harr. (Del.) 512; *People v. Klein*, 1 Edm. Sel. Cas. 35; *Coylee v. Commonwealth*, 100 Pa. St. 573; *S. C.*, 45 Am. Rep. 397.

The charge of the court on this subject, as given, eliminated entirely the principle above discussed. It required the jury to find, not only that the will was overpowered, but reason dethroned, before they could acquit the accused on the ground of delusional insanity. According to the *Roberts Case* and the authorities cited above, a man may know and may reason that the act about to be committed is wrong, and yet, if the will be overmastered by reason of mental disease, and he has so far lost the power to choose between the right and the wrong, and to avoid doing the act in question, as that free agency is at the time destroyed, and the act done is so connected with the delusion produced by such mental disease in the relation of cause and effect as to have been the result of it solely, he is not criminally responsible. The charge of the trial judge is directly in conflict with the *Roberts Case*, and the authorities here cited, and a different test is required in cases of this kind. The exception to the right and wrong test announced in the *Roberts Case* by Judge Nisbet was not given in charge to the jury, and they therefore did not pass upon the question made in that exception,—that, if a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, produced by a disease of the mind, the will is overmastered, there is no criminal intent if the act itself be connected with the peculiar delusion under

which the mind is laboring. The trial judge should have given this exception in charge, and required the jury to find, as matter of fact, under the evidence, whether the will of the accused was so overpowered by reason of a delusion produced by mental disease that he could not resist, although he might have known that the act itself was wrong, and also to determine whether or not the act committed was connected with the delusion, and produced solely by it. We think the court erred in refusing to give the written request to charge to the jury, and also that he erred in charging, as he did, on the subject of delusions. For these reasons only, we reverse the case, and order a new trial. If the accused was, under the law, responsible for his acts, he is guilty of a horrible murder. If he was not so responsible, he is entitled to an acquittal. Whether he be guilty or innocent, he has not, in our opinion, had a fair and impartial trial under the constitution and laws of his State; and, so believing, we are, under our oaths, compelled to grant him a new trial.

4. When, after the trial of the issue raised by the special plea of insanity, the case was called for trial upon its merits, the accused moved for a continuance upon the ground of the illness of his leading counsel. In a written affidavit made in support of this motion, he alleges the employment of his leading counsel, that he relied solely upon him, that he had never consulted with junior counsel, etc. The continuance was granted. At the trial upon the merits, at a succeeding term, counsel for the State offered the affidavit in evidence, and it was admitted over the objection of counsel for the accused. It was not error to admit this affidavit in evidence. We think it is now well settled that, in testing the state of mind at a given period, evidence may be admitted as to the state of mind both before and after that time. 1 Bish. New Crim. Law, § 385. And, to ascertain the state of mind as to a particular subject, we may look to evidence of its condition as to other subjects. *Ibid.* The probative force of the evidence is, of course, a question for the jury. The affidavit admitted may illustrate the state of mind of the accused at the time of the commission of the homicide, or it may not. Speaking for myself, knowing, as I do, how these affidavits for continuances are prepared by counsel, I should give such an affidavit little attention in a trial like this were I

on the jury. It was made five months after the time of the homicide, and does not relate directly to the subject on which the accused is claimed to be insane. Still, as it may have been of some value to the jury, it was admissible, and the trial judge did not err in overruling the objections made to its introduction.

5. There are other questions made in the record, but, with the exception referred to in the third headnote, there is no material error in any of those which we deem it necessary to consider. As to whether the court erred in not granting a change of venue is not passed upon, for the same conditions and circumstances may not exist at the next trial. Nor do we rule upon the refusal of the court to allow the recall of one of the medical experts to the stand, for the accused will have an opportunity, at the next trial, to elicit his opinion. It is claimed that the judge refused to allow the accused to complete his statement to the jury, and that one of the jurors was prejudiced against the accused, but these questions are not at all likely to arise at another trial, and we therefore do not rule upon them. The charge of the court, save as to the matter of delusional insanity, was full and fair, and the exceptions to it relating to matters other than as ruled in the third headnote are not meritorious. There was no material error in admitting or rejecting evidence. Judgment reversed. All the justices concurring, except LEWIS, J., disqualified.

FLANAGAN V. STATE.

106 Ga. 109—32 S. E. Rep. 80.

Decided December 13, 1898.

INSANITY: HYPOTHETICAL QUESTIONS: EXPERT EVIDENCE: *Homicide trial—Prejudice of juror—Illness of counsel.*

1. It was, in a trial for murder in which the sole defense was that the accused was insane at the time of the homicide, improper and illegal to allow the following question to be propounded to an expert witness, the answer thereto being in the negative: "State whether, in your opinion, from your examination of [the accused], from all that you know of him, have observed of him, or heard of him, he was laboring, at the time this crime was committed, under any overmastering delusion."

2. A new trial is granted in the present case, not only because of the error indicated, but also because the record discloses grave reasons for fearing that one of the jurors was not impartial, and also because it appears that the leading counsel for the accused was so ill before the trial concluded that he was not in proper physical condition to give to the case that degree of care and attention which its importance required.
3. The numerous grounds of the motion for a new trial not referred to in the preceding notes do not present any question which is essential to decide at this time.
(Syllabus by the Court.)
4. An expert witness should not be allowed to give opinions based on undisclosed information, hearsay, or upon the results of his own unexplained observations.
5. It is imperative that the jury be apprised of the facts, circumstances and conditions upon which the expert founds his opinions, and the questions should clearly refer to such means of knowledge; otherwise the jury, not knowing upon what conditions such opinions are founded, cannot intelligently determine to what weight, if any, they are entitled. (Pars. 4 and 5 by the Editors.)

Error to the De Kalb County Superior Court; Hon. J. S. Candler, Judge.

Glenn & Rountree and G. C. Spence, for the plaintiff in error.
J. M. Terrell, Atty. Gen., and *W. T. Kimsey*, Solctr. Gen.,
for the State.

SIMMONS, C. J. Flanagan was indicted for murder, and defended on the ground of insanity. The jury returned a verdict of guilty, but a new trial was granted. *Flanagan v. State*, 103 Ga. 619, 30 S. E. Rep. 550. Upon his second trial, the accused was again convicted, without recommendation. His motion for a new trial was overruled, and he excepted.

1. The following question was propounded by the State's counsel to one of the expert witnesses introduced by the State: "State whether, in your opinion, from your examination of [the defendant], from all that you know of him, have observed of him, or heard of him, he was laboring, at the time this crime was committed, under an overmastering delusion." To this question the witness was allowed, over the objection of the defendant's counsel, to give a negative answer, the objections made to the question being that it was "not in proper shape," was "not a proper question for the witness to form an opinion on,"

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and was "not a proper hypothetical question." To this ruling exception was taken. An expert on insanity, as was the witness of whose evidence complaint is here made, may give an opinion based upon his own examination of a person, upon his observation of that person, or upon any state of facts, supported by some evidence in the case, which he assumes as true. The jury should be informed whether he bases his opinion on his own knowledge or upon a hypothetical state of facts, and should know what portion of the evidence he has assumed to be true in forming his opinion. In the present case, the witness gave an opinion which may have been based, in whole or in part, upon *what he had heard* of the defendant; and we think it should not have been received. Suppose another expert witness had testified that, from what *he* had heard, the homicide was committed under an overmastering delusion; how could the jury have possibly derived any assistance from this evidence? The two experts might have testified thus contradictorily, and yet been each correct, because of their having heard very different things of the defendant, and the jury would have been unable to form any conclusion as to the truth of the facts upon which either opinion was based. "It has never been held that a medical expert has the right to give in evidence an opinion based on information which he has derived from private conversations with third parties." Rogers, *Expert Test.*, § 46; *Louisville, etc. Ry. Co. v. Shires*, 108 Ill. 617, 630. "Expert opinions are admissible if based upon a state of facts which the evidence on behalf of either party tends to establish; but the jury should know upon what facts the opinion is founded, for its pertinence depends upon whether the jury find the facts on which it rests. . . . An opinion, based mainly upon representations out of court, can be no more competent testimony than the representations. If the jury are not informed what the representations were, they do not know upon what hypothesis of facts the opinion rests. If they are informed, they are still left with no evidence of the existence of the facts, except unsworn declarations of a third person out of court, which are not proof in courts of law." *Wetherbee's Ex'rs v. Wetherbee's Heirs*, 38 Vt. 454. See, also, *Heald v. Thing*, 45 Me. 392; *Hunt v. State*, 9 Tex. Crim. App. 166; *Polk v. State*, 36 Ark. 124; *Hurst v. Railroad Co.*, 49 Iowa,

76; Lawson, Exp. & Op. Evid., 144 *et seq.* "Medical men are permitted to give their opinion as to the sane or insane state of a person's mind, not on their own observations only, but on the case itself, as proved by other witnesses on the trial; and, while it is improper to ask an expert what is his opinion upon the case on trial, he may be asked his opinion upon a similar case hypothetically stated." *Choice v. State*, 31 Ga. 468. In the present case, the expert witness testified as to his opinion, based, to how great an extent does not appear, upon what he had heard. The jury had no possible means of knowing whether his opinion was not based upon an assumption of the truth of rumors or reports which the jury did not believe to be true, or of whose truth there had been submitted to them absolutely no evidence. It is therefore clear that the question was improper, because it allowed an opinion based upon what the witness had heard of the accused, and that the evidence was inadmissible.

Nor was the evidence otherwise unobjectionable. It was not competent for the expert to give in evidence an opinion based upon what he knew of the accused, without stating what he knew of him. The opinion may have been based upon facts known to the witness, but altogether unknown to the jury; or the jury, had they known such facts, might have attached to them so little importance as to disregard an opinion known to be based upon them, and to lose faith in an expert who regarded them as sufficient foundation for a positive opinion as to such a weighty matter. As was said in the case of *Burns v. Barenfield*, 84 Ind. 43, 48: "It is the clear right and duty of the jury to judge of the truth of the facts upon which the opinion of the expert is based. If his opinion is based upon what he may suppose he knows about the case, upon facts, it may be, altogether irrelevant and unknown to the jury, it would be impossible for them to pass upon the truth of the facts upon which the opinion may be based, or to apply the opinion of the expert to the facts. Neither court nor jury can know the facts upon which the opinion rests. It is obvious that, where the expert delivers his opinion from what he supposes he knows about the case, he must assume and exercise both the functions of the court and the jury,—he determines that what he knows is both relevant and true. The relevancy of the facts must be determined by the

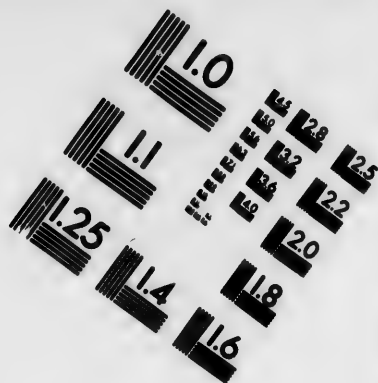
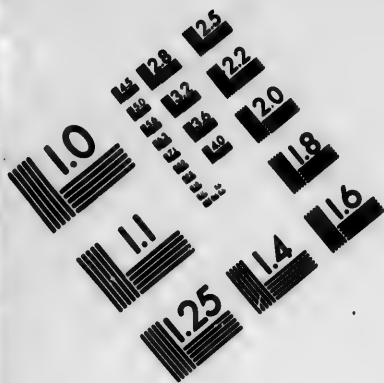
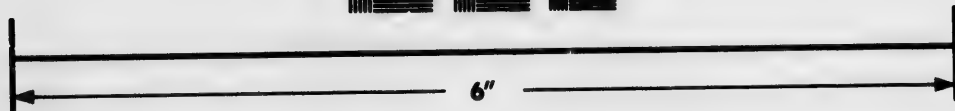
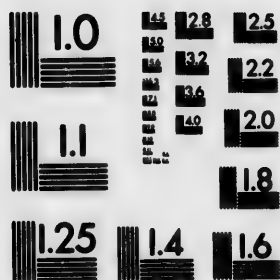


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court, their truth by the jury. The witness cannot pass upon such questions." See, also, *Louisville, etc. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908; *Van Deusen v. Newcomer*, 40 Mich. 90, 119, 120.

In addition to these objections, the question was "not in proper shape," and was certainly "not a proper hypothetical question." Where the question at issue is one of opinion merely, as that of sanity or insanity, a witness who has "knowledge of the facts and their surroundings may give his opinion by showing the reason for it, whether he be an expert or not." *Killian v. Augusta & K. R. Co.*, 78 Ga. 749, 3 S. E. Rep. 621; Civil Code, § 5285. When, however, an expert is asked to give an opinion on facts not coming within his own knowledge, the question should be hypothetical. *South Bell Tel. Co. v. Jordan*, 87 Ga. 69, 13 S. E. Rep. 202. "A scientific expert who has observed none of the facts for himself should give his opinion on a hypothetical case similar to that before the jury, and not on the actual case, as if he were a juror instead of a witness." *Griggs v. State*, 59 Ga. 738; *Choice v. State*, *supra*. In the present case the question was not hypothetical, and yet was so framed as to allow the witness to give an opinion on facts unknown to him, but testified to or stated by others. Not only was his opinion asked directly as to the case, but it was asked as to the controlling, and, indeed, the only, issue in the case. The defense relied upon was that of delusional insanity, and it was contended that at the time of committing the homicide the accused was acting under such a delusion, brought about by mental disease,—that his will was overmastered. The testimony of this expert that the accused was not "laboring, at the time this crime was committed, under any overmastering delusion," was, therefore, tantamount to the expression of an opinion that the accused was guilty of murder. "Questions should be so framed as not to call on the witness for a critical review of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of fact from the testimony, or to pass on the credibility of the witnesses, the general rule being that an expert should not be asked a question in such a manner as to cover the very question to be submitted to the jury. As expressed in one of the opinions, 'a question should

not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them.' " Rogers, Exp. Test., § 26, and cases cited. And in *State v. Felter*, 25 Iowa, 67, 74, the following question was said to be improper, for the reason that it "practically [put] the medical witness in the place of the jury:" "From the facts and circumstances stated by previous witnesses, and from those testified to by still other witnesses, relating to the homicide, and from defendant's conduct on the trial, is it your opinion that the defendant was sane or insane when he committed the act?" See Rogers, Exp. Test., *supra*.

For the reasons above given, we think the evidence was manifestly inadmissible, and that the court erred in overruling the objection made to the question. Nor can the error be treated as one of little importance. There was evidence in the case which would have supported a finding that the will of the accused, in consequence of a delusion brought about by mental disease, was overmastered, so that there was no criminal intent as to the act in question, and that this act was connected with the peculiar delusion under which the accused was laboring. Where such evidence was before the jury, who can say whether their finding to the contrary was or was not brought about by this illegal evidence? This court cannot do so. This testimony was given by the principal expert witness for the State, and went directly to the very subject which the jury had to decide, and we cannot say that their finding may not have been used upon such testimony, or that it may not have served to remove from their minds a reasonable doubt which would otherwise have existed there as to the sanity of the accused.

2. We think we have demonstrated that it was reversible error to allow the question and answer of the expert witness alluded to above. That error was in itself sufficient to require the grant of a new trial, but there were other errors complained of which, taken in connection with that heretofore discussed, makes us the more certain that the ends of justice require a new trial. It was established, almost beyond dispute, that one of the jurors was incompetent to serve upon the trial. There was positive proof that, a day or two before the trial, he expressed an opinion

that the accused was sane at the time of the commission of the homicide, and should be hung. The juror made no denial of this, except to swear that another used the expression, and that he agreed to it in an unthinking way. If we could consider, in addition to the affidavit of the person to whom the juror expressed his opinion, the affidavit which contains a written admission of the juror, the latter's incompetence would be established; but the general trend of the decisions of this court is that admissions of a juror, made after the trial, cannot be used to impeach his verdict, although in the case of *Martin v. State*, 25 Ga. 494, a new trial was granted solely upon the admissions of a juror.

Furthermore, it appears from the record that on the trial Mr. Rountree was the leading counsel for the defense; that, after two speeches had been made on Wednesday, Mr. Rountree was taken ill with a severe attack of cholera morbus, and the court adjourned from time to time until Friday afternoon. At that time Mr. Rountree appeared, having previously filed an affidavit by his physician that he was physically unable to conduct the case, and stated in his place in court that he had been sick since Wednesday with this attack of cholera morbus, that he was unable to proceed with the argument, and that he, having tasted no food in fifty-six hours, could not in his then condition do his client justice. The refusal, under these circumstances, to grant a mistrial is assigned as error. The trial judge, in approving this ground of the motion for new trial, says, in substance, that in a private conversation he had announced to Mr. Rountree a willingness to take another recess; that Mr. Rountree did not so understand the court; that the announcement was not made from the bench; that in his opinion Mr. Rountree was able to make his argument to the jury; and that he ordered the trial to proceed. The motion for mistrial was made in open court, and in open court the judge overruled it. What was said in private conversation, off of the bench, was not binding upon the judge or counsel, for it was not such a ruling as could be excepted to and assigned as error in this court. *Grant v. State*, 97 Ga. 789, 25 S. E. Rep. 399. There was an affidavit of Mr. Rountree's condition, and his statement in his place that he was unable to make the concluding argument for his client. The judge,

it seems, thought that he knew the condition of Mr. Rountree better than did the latter or his physician. When an attorney makes a statement in his place, it is considered as binding as though he were under oath. This attorney, therefore, stated in a manner equivalent to an oath that he was too ill, on account of a sudden attack of cholera morbus, and the consequent weakness and debility, to proceed with the trial. It does seem to us that an attorney who had been thus afflicted, who had been without food from Wednesday night until Friday afternoon at four o'clock, was physically incompetent to discharge properly the duties of his office on the trial of a murder case. The constitution and laws of this State guaranty to every person charged with an offense against its laws a fair and impartial trial and the benefit of counsel. Whether or not the accused was guilty of murder, whether or not he had capacity to form a criminal intent, his guilt must be ascertained in a fair and lawful manner. As was said by Warner, C. J., in the case of *Moncrief v. State*, 59 Ga. 470, 472, "The defendant may or may not be guilty of the offense with which he is charged; but, if he is guilty, that is no reason why the court should be less careful to see that he is tried and convicted in accordance with the laws of the State, inasmuch as the penalty is the loss of life." Believing that this has not been done in the present case, we cannot, as judicial officers, affirm the conviction, but must, in the performance of our duty, reverse the judgment of the trial court, and direct that the accused be again put upon trial.

3. The motion for new trial contained many grounds with which we do not here deal. Some of these the trial judge did not verify as made, but qualified and explained in approving them. As they now stand, it is not necessary to mention them here. None of them will be at all likely to arise upon another trial of this case, and a decision of them would not be helpful. Judgment reversed. All the justices concurring, except LEWIS, J., disqualified.

NOTES (by H. C. G.).—(By referring to pages 601-606, 10 American Criminal Reports, the reader will find quite an extensive collection of citations and authorities on "Insanity.")

Burden of proof on insanity issues—Presumptions of sanity and insanity—Their application to general and temporary insanity—Rule as

to "right and wrong," etc.—In a short opinion, while dissecting erroneous instructions, the Mississippi court canvassed these doctrines, which, for the sake of perspicacity, we formulate as propositions. *Ford v. State*, 73 Miss. 734, 19 S. W. Rep. 665 (1896).

1. Every man is presumed to be sane until the contrary is shown.
2. The burden of proof never shifts in a criminal case, but is always on the State.

3. This presumption of sanity in general supports this burden of proof, and stands in place of, and dispenses with, actual proof of sanity by the State

4. But when evidence is introduced tending to show insanity in the defendant, or to raise a reasonable doubt as to his sanity at the time of the commission of the act, then this general presumption is neutralized and negated, and the burden that at all times rests upon the State requires it to now establish by evidence, beyond reasonable doubt, as an essential element of its case, that the defendant was sane at the time of the act charged against him.

5. Where the evidence shows merely temporary or recurrent insanity (such as paralysis, epilepsy, etc.), without raising a reasonable doubt as to its existence at the *time of the act*, then the State may rely upon the general presumption of sanity, and will not be obliged to prove a lucid interval in order to fix responsibility upon the defendant.

6. But where general or habitual insanity has been shown, sufficient to raise a reasonable doubt, then the presumption arises that such an insane condition *continues to exist*, and the burden is then upon the State to negative *this* presumption, by showing a lucid interval at the time of the commission of the act.

7. The court also reaffirms the principle that if the disease goes to the extent of breaking down the distinction between a knowledge of right and wrong, it is immaterial whether the sufferer be totally or partially insane on other subjects; and also,

8. That a reasonable doubt arising out of the whole evidence as to the defendant's sanity entitles him to an acquittal.

The doctrine in Nebraska, on the burden of proof in insanity cases, and the capacity to distinguish between right and wrong, were discussed in *Knight v. State*, 58 Neb. 225, 78 N. W. Rep. 508 (1899), as follows:

"In relation to the defense of insanity, upon which the prisoner relied, the court said to the jury, in the twelfth instruction: 'You are instructed that the law presumes that every person is sane, and it is not necessary for the State to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove insanity of an accused, the burden is then upon the State to establish the fact of the accused's sanity, the same as any other material fact to be established by the State to warrant a conviction. If the testimony introduced in this case tending to prove that the defendant was insane at the time of the alleged burning described in the information raises in your mind a reasonable doubt of his sanity at the time of the alleged burning, then your verdict should be acquittal.'

It is contended that this instruction gave the jury to understand that the burden of establishing his insanity rested upon the defendant up to a certain point in the trial, and was then shifted from him to the State. *Snider v. State*, 56 Neb. 309, 76 N. W. Rep. 574, is cited as authority for this contention. Whatever may be said of the meaning of the instruction considered in the *Snider Case*, there can be no room to doubt that the court, in the instruction now under consideration, stated the correct doctrine in unmistakable terms. In this case the jury were informed that the law presumes sanity, but that, when the defendant produced evidence tending to prove insanity, the State was charged with a burden which did not previously rest upon it. The court did not say or imply that the burden of proving insanity was ever on the accused, or that there was a shifting of the burden from him to the State. The substance of what the court did say was that, when the legal presumption of sanity encountered opposing evidence, the law then, for the first time, imposed on the State the onus of showing the prisoner's sanity by the proper measure of proof.

"The thirteenth instruction was also excepted to, and its correctness is now vigorously challenged. It is as follows: 'You are instructed that insanity which renders a person irresponsible for an act is such a diseased condition of the mind as renders the person incapable of understanding the nature of such act, and incapable of distinguishing between right and wrong with respect to such act. So in this case, if the evidence introduced tending to show that the defendant was at the time of the fire incapable of understanding and knowing what he was doing, and that at such time he could not distinguish between right and wrong, raises in your mind a reasonable doubt of the defendant's sanity at the time of such fire, then you should acquit him.' By this instruction the jury were plainly told that they might acquit the defendant, on the ground of insanity, only in case (1) he was at the time of the fire incapable of understanding the nature of his act, and (2) that he was at the same time incapable of distinguishing between right and wrong with respect to that act. Such is not the law, and the giving of this instruction was an error fatal to the conviction. Ordinarily, insane persons comprehend the nature of their acts. When they take life or destroy property, they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view. The jury in this case may have believed that the defendant applied a lighted match to the property in question, understanding well that combustion would follow, and that the store building and its contents would be reduced to ashes; and they may have refused, for that reason, to acquit him, although reasonably doubting his capacity to distinguish between right and wrong with respect to the act. In the answer of the English judges to the questions propounded by the House of Lords, as a result of the acquittal of McNaughton for the killing of Drummond (*McNaughton's Case*, 10 Cl. & Fin. (Eng.) 200), Chief Justice Tindal, speaking for himself and his associates, among other things, said that there is no criminal responsibility where, 'at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the

nature and quality of the act he was doing, or, if he did know it, that he did not know he was wrong.' The rule thus announced has been since 1843 the unquestioned law in England; and it is now the generally accepted doctrine of the American courts. It was recognized by this court in *Wright v. People*, 4 Neb. 407, and has been since frequently approved. *Hawe v. State*, 11 Neb. 537, 10 N. W. Rep. 452; *Hart v. State*, 14 Neb. 572, 16 N. W. Rep. 905; *Thurman v. State*, 32 Neb. 224, 49 N. W. Rep. 338. In *Hawe v. State*, it was said: 'And, where an individual lacks the mental capacity to distinguish right from wrong in reference to the particular act complained of, the law will not hold him responsible.'

The case of *Frances Green*, 64 Ark. 523, 43 S. W. Rep. 73 (Jan. 8, 1898), possessed an element of novelty, in that she was an eighteen-year-old colored girl—a teacher in the Sunday school—who was convicted of murder, the defense being insanity. She was engaged to be married, and was *enceinte* by her fiancée. On learning that he was about to marry another woman, she did not eat or sleep for three days, walked almost continually, and said that she was worried to death. Then deceased, with the woman he had just married, walked past her home, and she, taking up a gun, ran after and shot him. After this, her mind seemed to be relieved; she sang and laughed and talked unconcernedly about the affair, and seemed to think that she had done right. Several questions arose.

(1) The court excluded the evidence of the sheriff in her behalf, as to her demeanor in jail. This was error, because, while in general the subsequent conduct of a defendant is not admissible, yet, in insanity cases, such evidence is admissible when it goes to show a *continuing* state of mental disorder.

(2) The court excluded evidence of inherited insanity—aberration of mind of mother, grandmother, grand-aunt, etc. This was error.

(3) The defense propounded to an expert a hypothetical question embracing the facts of the case, and the demeanor and actions of the defendant, and also the condition that if her ancestors showed a taint of insanity, whether or not, in his opinion, the shooting was an act of insanity. The witness was not permitted to answer,—and this was error. (Cited 1 Whart. & S. Med. Juris., sec. 376; 2 Bish. Cr. Proc. (3d ed.), sec. 685; 54 Ark. 588; 117 Mass. 143, *et al.*)

(4) A physician of five years' practice, who "had studied mental diseases so far as ordinary cases were concerned," etc., but never had any experience in their treatment, was excluded as not being an expert; *held*, that his qualifications were doubtful.

(5) Another physician of twenty-one years' practice who "knew something about insanity," had studied nervous diseases, and treated them to some extent, "as every physician of twenty years' practice would have to do," was excluded, was held to be competent. (Among the authorities cited were Rogers, Ex. Test. (2d ed.) 45; 53 Mich. 63; 48 N. H. 304; 50 N. H. 452; 36 Kan. 1; 38 Kan. 550; 62 Ark. 74.)

On the question of "knowing right from wrong" the court admitted that it was true that a person may have such knowledge and yet not be responsible for his act, but that the following conditions must also

exist, viz.: Such person must have been so afflicted with a disease of the mind as thereby to have so far lost the power to choose between the right and the wrong, as that his free agency was destroyed,—and at the same time the alleged crime must have been so connected with such mental disease, in relation of cause and effect, as to have been the product of it solely,—without the aid of any other cause. Reversed.

PEOPLE v. SHELDON.

156 N. Y. 268—50 N. E. Rep. 840.

Decided June 7, 1893.

JURY, COERCION OF: *Homicide trial—Setting verdict aside.*

1. No juror should be induced to agree to a verdict from fear of censure upon his intelligence or integrity. Jurors should not be subjected to privations and hardships that will test their physical strength and endurance, and that might induce them to acquiesce in a verdict from physical exhaustion and a desire to avoid further punishment.
2. It is not the prerogative of the judge by commands, insinuations and profuse and repeated argumentation on the necessities of justice, public policy, economy, pride of opinion, etc., to seek to overcome the opinions and judgment of jurors for the purpose of bringing about a verdict.
3. The jury was out eighty-four hours without beds or cots, forty hours of that time confined in a small room. Several times they informed the court that they could not agree, but were each time sent back with the admonition that they could agree and that they must agree, if possible; the court reminding them that the trial had lasted nearly seven weeks, and was expensive, and insisting that they completely recanvass the case from the beginning, telling them that he could not hear of a disagreement,—that that would almost amount to a confession of incompetency, etc. *Held*, that this was a virtual coercion of the jury, and that the verdict should be set aside.

Appeal from a conviction of murder in the first degree, of the Supreme Court, in Cayuga county.

The defendant, Frank L. Sheldon, was, on the 9th day of October, 1896, indicted by the grand jury of Cayuga county for the crime of murder in the first degree, charged with the killing

of his wife, Eva M. Sheldon. On the 12th day of October, 1896, he was arraigned on said indictment, and pleaded not guilty. On the 25th day of January, 1897, at a trial term of the Supreme Court held in and for the said county, the indictment was moved for trial. The trial lasted for seven weeks, ending on the 15th day of March.

A great number of witnesses (119 in all) were examined. The evidence against the accused was largely circumstantial. The defense insisted that the deceased came to her death by suicide, and considerable evidence pointing in that direction was given during the progress of the trial. It was generally supposed at first that the deceased had taken her own life, as, when the body was discovered in a closet of the house occupied by her and the prisoner, a pistol was lying beside it, and not for some time after the burial was the defendant accused of the crime of which he was subsequently convicted. In fact there were two disinterments of the body, considerable time elapsing between them, before the idea of murder became prevalent and the prisoner charged with the crime.

On March 11th the case was finally submitted to the jury, who immediately retired to deliberate upon their verdict. Three times, at their request, the jury were brought into court for instructions. After being out all of one night and the greater part of one day, they announced that they had not agreed upon a verdict. The judge ordered the jury to be sent out again for further deliberation. They returned into court the second time, after having been out two nights, all of one day, and part of the second day, and reported, in a writing signed by the foreman, that they were unable to agree upon a verdict, and that it was impossible for them to do so. The jury were again sent back to the jury room by the court, after receiving certain instructions, and remained there until 3:20 o'clock of that day (it being Saturday), when they were sent for by the court, who, after giving them further instructions and directing certain provisions to be made for their convenience and comfort, ordered them to be taken back for further deliberation. They remained out, from that time, two nights and one day, until Monday morning, when they returned into court, and announced a verdict of guilty as charged in the indictment. The jury were out

altogether four nights and about four days. During all this time they had been provided with no sleeping accommodations whatever, confined for two nights and almost two days in the narrow quarters of a jury room, and the rest of the time in the court room, which had been set aside for that purpose. What followed each time, as the jury returned into court, will fully appear by the following synopsis taken from the record.

Jury went out Thursday, March 11, 1897, at 8:30 p. m. 11:30 a. m., Friday, jury came into court, and asked two questions as to the evidence, which were answered by the court from the minutes of stenographer, folios 11,202 to 11,240, without objection. 3:25 p. m. jury again came into court and announced they had not agreed upon a verdict. By the court: "Well, gentlemen, you must make an effort to agree. This case has involved immense labor. A great deal of time, as you know, has been given to it, and, from all the evidence that has been produced, it would seem that the case is susceptible of a conclusion. The only way of reaching a conclusion is through the verdict of the jury. There is no reason why these twelve men are not as capable of understanding this case and coming to a conclusion as any other twelve that could be gotten together. It is a case of too much importance, that has entailed too much labor, to permit a jury to separate without the utmost effort to agree. Differences that exist amongst you as to the evidence must be further investigated. Any questions of law the court will be glad to explain to you. It is for the interests of all concerned and public justice that there should be a decision of this case so that the questions in it shall be put at rest. *I cannot hear of a disagreement of this jury. You must retire, gentlemen.*" The jury again retired at 3:30 p. m., and at 5:30 p. m. sent a communication to the court asking for further information. Instructions were given, and questions of jury answered by reading from stenographer's minutes, folios 11,245 to 11,281, without objection. Jury then retired. Saturday morning, March 13, 1897, the jury came into court by the order of Justice Dunwell, at 12:45 p. m., and presented a written communication to the court, Mr. Drummond having previously waived his presence in court, which read as follows: "Judge Dunwell—Dear Sir: The probability or even possibility of this jury ever agreeing is

impossible in my opinion. George J. Holden, Foreman." By the court: "The order will be that you be conducted to your hotel, and that you be brought back for further deliberation. The counsel for the defendant is not here, and later I will have something further to say to you with reference to your present communication. I have made my own arrangements so as to be back at your call both for to-day and for some time in the future, so that the case may be fully disposed of if there is a possibility of it, and I will have something further to say on this subject later in the day, when the defendant's counsel can be present." At 3:20 p. m. the jury again returned to the court, and were addressed by the court as follows: "Gentlemen, I have been giving consideration to the note that you addressed to the court this morning, in which you stated your doubts as to your ability to agree upon a verdict in this case. I very much regret this supposition of yours, but I by no means despair. This case has involved immense labor, enormous expense has been entailed, evidence has been gathered and brought before you from every direction, evidence bearing directly upon the issues in this case, and some of it remotely upon the issues. All, everything that could be suggested, that might throw light upon the question submitted to you, has been brought before you and is in your possession. Now, the truth of this case lies within the compass of that evidence. *Mrs. Sheldon died by violence.* How that came about and whether the defendant is guilty or innocent is something that must be told by the evidence that has been presented to you. *I don't know that you fully appreciate the gravity and importance to this community and to the State that a decision shall be reached in this matter,* and that this important question shall be settled as to whether the defendant is guilty or innocent. This case has occupied nearly seven weeks, and to say now, at the end of all that time, at the end of all this labor and expense, that the question is no better off than it was when started, *is almost to confess incompetency in this matter.* Of course, I have no means of knowing, and I don't desire to know, unless it is something that you desire to bring before the court, the reasons why this state of affairs exists in your body. I hope it is nothing like pride of opinion. I hope it is nothing like, having once taken a position in this case, that, therefore, you

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must say it is unalterable; that it is not susceptible of change by argument, and by a review of the evidence in the case,—because such considerations as those would be most unworthy to divide a jury upon so important a question. Engaged as I am in the administration of, or attempt to administer, public justice in this district, I have laid aside my other engagements so that this case can be attended to, because I appreciate the importance of it, and I would like to enforce upon you an appreciation of the importance of settling this question. *It has got to be settled.* When an affair of this kind has occurred it has got to be tried, it has got to be investigated, and the interests of public justice will not stop short of going to the very bottom of it, and discovering what the truth is, regardless of time and expense. I do not say these things, gentlemen, in a fault-finding way. I desire to say them to you with the idea of urging upon you and of bringing to your minds an appreciation of the great importance of this matter, and of settling it and deciding it. I appreciate somewhat your position. I don't say this with any unkindness. I know that your labors in this matter have been tedious, and that they are wearisome, and I appreciate the length of time that you have been out, and you must not think that I am forgetful of these things; but there must be a supreme effort made on your part to harmonize differences, and, *therefore, I am going to insist that you begin at the very outset of the case, from the very beginning, and go over it again, looking at it from every possible point of view, so that there shall not be a failure of justice in this case.* I know that your jury room is a narrow place, and that you are a good deal confined there, and for that reason I have arranged with the sheriff that you shall occupy this room from now on to the completion of your labors. Of course, I don't know how long it will take, and, therefore, I have arranged with the sheriff that you shall have more comfortable quarters, so that this room will be cleared shortly after you have retired, and the officers will remain downstairs in the sheriff's office, and you will be given this room, giving you a better opportunity to circulate about, and making your position as comfortable as possible under the circumstances.'

"At 7:35 p. m. the court ordered that the jury be taken to supper and returned to their room for further deliberation.

. . . The court also entered an order that the jury should be conducted to their meals at the usual hours, to-morrow, Sunday, and including Monday morning. Defendant's counsel objected and excepted to the remarks and instructions given to the jury, at 3:20 p. m., on March 13, 1897, and to each and every part thereof. Defendant particularly and specifically objects and excepts to folios 11,305 to and including folio 11,317, and also asks that the written communication of the jury to the court be made a part of the record. Monday morning, March 15, 1897, at 7:30, the jury sent word to Justice Dunwell that they were ready to report, and they were accordingly brought into court at 8:30 a. m., the roll called by the clerk, and the question put: 'Gentlemen of the jury, have you agreed upon a verdict?' By Foreman Holden: 'We have. We find the prisoner guilty as charged in the indictment.' By the court: 'You say you find the prisoner guilty, as charged in the indictment, of murder in the first degree?' By Foreman Holden: 'We do.' The jury were thereupon polled, and each answered, 'Guilty.' . . . Defendant's counsel moved arrest of judgment under section 487 of the Code of Criminal Procedure, and also on each and every ground, as provided by the Code of Criminal Procedure in reference to an arrest of judgment. Defendant's counsel also moved for a new trial in the case, under section 485 of the Code of Criminal Procedure, and upon each and every ground stated in section 485, and especially subdivisions 4, 5, and 6 of that section. Both motions were denied, and exceptions taken by defendant."

Robert L. Drummond, for the appellant.

George W. Nellis, for the People.

PARKER, C. J. The question before this court is not how long may a court keep a jury together, for that is a matter resting in the sound discretion of the trial court. Nor is the question whether a jury should be compelled to stay together more than one night without a bed, or at least a cot, to lie on, for that, too, is a matter resting in discretion. It seems a wiser exercise of that discretion, however, to provide sleeping accommodations for the jury after the first night, at least. This can be readily done in most hotels, without interference with the requirement to

keep the jury together. But, while these questions are not before the court, the facts which suggest them are, and, together with other facts, they command an answer to the query, may there be coercion of a jury in a capital case? If this question be answered in the negative, there follows the further inquiry, was there coercion in this case?

By the ancient common law, jurors were kept together as prisoners of the court until they had agreed upon their verdict. Thompson & Merriam on Juries, § 310. It was regarded not only proper, but requisite, that they should be coerced to an agreement upon a verdict. Proffatt, Jury Trial, § 475. "A jury, sworn and out in a case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." Coke Litt. 227*b*. Blackstone, Com., p. 375, says: "The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. . . . And it has been held that, if the jurors do not agree in their verdict before the judges are about to leave the town, the judges are not bound to wait for them, but may carry them to town in a cart." In the Doctor and Student (1518), at page 271, it is said: "I take not the law of the realm to be that the jury, after they be sworn, may not eat nor drink till they be agreed of the verdict; but truth it is there is a maxim and an old custom in the law that they shall not eat nor drink after they be sworn, till they have given their verdict, without the assent and license of the justices. . . . And, if they will in no wise agree, I think that the justices may set such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding a new inquest, and by setting fine upon them that they shall find in default, or otherwise as they shall think best in their discretion; like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf." Mr. Emlyn, in his preface to the second edition of the State Trials, printed in 1730, says: "The law requires that the twelve men, of which the jury consists, shall all agree before they give in a verdict; if they don't, they must undergo

a greater punishment than the criminal himself; they are to be confined in one room without meat," etc., "till they are starv'd. It would be pretty hard to assign any tolerable reason for this usage; if it has seldom or never happen'd, I'm afraid it has sometimes been prevented only by the unjust compliance of some of the jurors against their own consciences. . . . To what end, therefore, are they to be restrained in this manner? It may, indeed, force them to an outward seeming agreement against the dictates of their own consciences, but can never be a means of informing their judgment or convincing their understanding. . . . Why must the jurors be compelled to an agreement one way or the other? After all, a forced agreement is no better than none. If the consent of him who stands out against the rest be of any regard, it ought to be free; if of none, then why can't a verdict be given without it?"

The inconsistency of insisting that every one of twelve men must agree before a verdict can be rendered, and at the same time justifying a court in coercing one or more jurors into an agreement with their fellows, received early attention by the courts of this State.

In *People v. Olcott*, 2 Johnson's Cases, 301, the defendant was tried under an indictment for conspiracy to defraud, and, the jury being unable to agree, the court, against the consent of the defendant, ordered a juror withdrawn and the jury discharged. Mr. Justice Kent, in an opinion reviewing prior cases at length, paid his respects (at page 309) to the rule formerly existing of compelling an agreement of the jury. He said: "The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, that does not stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction obtained under such circumstances can never receive the sanction of public opinion. And the practice of former times, of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day."

In *People v. Goodwin*, 18 Johns. 187, the defendant was indicted for manslaughter. The jury being unable to agree be-

fore the last moment the court would sit, they were discharged. The question arose whether defendant could be again put upon his trial on the indictment. In writing the opinion of the court, Spencer, C. J., said: "In the case of *People v. Olcott* all the authorities then extant upon the power of the court to discharge a jury in criminal cases, and the consequences of such discharge, were very ably and elaborately examined by Mr. Justice Kent, and it would be an unpardonable waste of time to enter upon a re-examination of them." The chief judge quotes largely from Justice Kent's opinion, and says: "The learned judge inveighs, with force and eloquence, against the monstrous doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that a verdict is not founded on temperate discussion, but on strength of body. Although the case of *People v. Olcott* was a case of misdemeanor, the reasoning is, in my judgment, entirely applicable to cases of felony; and, although the opinion was confined to the case under consideration, a perusal of it will show that it embraces every possible case of a trial for crimes."

Other comparatively early criminal cases in which the same question was presented and passed on were *People v. Ward*, 1 Wheeler, Cr. Cases, 469; *Grant v. People*, 4 Parker's Crim. R. 527; *People v. Green*, 13 Wend. 55; *United States v. Perez*, 9 Wheat. 579.

In *Green v. Telfair*, 11 How. Pr. 260, a motion was made to set aside a verdict on affidavits. The judge said to the jury, in substance: This case has excited considerable feeling; the nature of jury trials implies concessions and compromise; no juror should control result, or otherwise the verdict would be that of one man, not that of twelve; that for five years he had discharged but one jury that had failed to agree, and he should send them out again, and hoped they would agree. One of the jurors said he supposed (it being Saturday afternoon) their duties would be at an end, and they would be discharged at twelve o'clock, to which the judge replied that this was not so; that he was authorized to receive the verdict on Sunday, and, besides, it was his intention to go to Albany by the next train, and, if they did not agree before he left, he would return on Monday and receive their verdict. Jury retired, remained absent about half an hour, returned into court, and rendered a ver-

dict for plaintiff. Mr. Justice Harris, before whom the motion was made to set aside the verdict on the ground of coercion, said in the course of his opinion: "An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they are so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right to even allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. . . . That, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court."

In *Slater v. Mead*, 53 How. Pr. 59, the judge said to the jury: "You must agree upon a verdict. I cannot discharge you until you agree upon a verdict." The jury retired, and soon returned and rendered their verdict of no cause of action. Verdict was set aside on motion at special term, the opinion citing with approval the remarks of Mr. Justice Harris in *Green v. Telfair*, *supra*.

In *Ingersoll v. Town of Lansing*, 51 Hun, 103, 5 N. Y. Supp. 288, the court made no provision for discharging the jury in the absence of the presiding justice from the county, unless they agreed, which compelled them to bring in a verdict or remain in confinement for four days without aid, protection, or even the presence of the court. On appeal, this was held to constitute coercion, and therefore that the trial court erred in refusing to set aside the verdict. In the course of the opinion, which was written by Mr. Justice Follett, the opinion in *Green v. Telfair* is cited with approval, and also *Pierce v. Pierce*, 38 Mich. 412. In the latter case the jury retired on Tuesday p. m. Wednesday p. m. officer informed the judge that they could not agree. Thereupon the judge directed the officer to inform them: "The judge does not believe it yet; and you might say to them that it is essential that they agree to-night, as I am going, and I won't be back until day after to-morrow, and they might not get discharged until I come back, as Judge Coolidge is going to

be here." The verdict was returned within an hour. It was held that the verdict should be regarded as coerced, the court saying: "Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice. The one may be right as well as the eleven, and if right may be able to persuade them. . . . And it is very possible, at least, that a message of this kind given would be regarded by the outstanding juror as a somewhat strong intimation of the judge's opinion of the plainness of the case and the impropriety of holding out."

In *Physioc v. Shea*, 75 Ga. 466, a new trial was granted, where a verdict was rendered shortly after the judge told the jury (which had been out all night) that they could have breakfast at their own expense, they having had no supper.

In *Chesapeake, O. & S. W. R. R. Co. v. Barlow*, 86 Tenn. 537, 8 S. W. Rep. 147, the jury reported inability to agree. The trial judge said: "This is too common, and you ought to agree;" that he would not discharge them, but should keep them together for the remaining three weeks of the term unless they agreed. They agreed next day. The verdict was set aside.

In *State v. Bybee*, 17 Kan. 462, the court said to the jury that they ought, by compromise and surrender of individual opinion, to agree, and that failure to do so would be an imputation on court and jury. In an opinion written by Judge Brewer the court presented its reasons for reversing the judgment, in part, that while the court might call the attention of the jury to many matters that rendered an agreement desirable, such as time already taken, improbability of securing additional testimony, the general public benefit in a speedy close of a litigation, the question of expense to parties and the public, yet no juror should be influenced to a verdict by fear that failure to do so would be regarded by the public as reflecting upon either his intelligence or his integrity. "Personal considerations should never be permitted to influence his conclusion, and the thought of them should never be presented to him as a motive of action." That was a criminal case, and it may be said, in passing, that the language used by the trial judge to the jury is very much like that used on one occasion by the judge in the case at bar. The intelligence of the jury was not more sharply reflected

upon in that case than in this, for the trial justice said: "This case has occupied nearly seven weeks, and to say now, at the end of all that time,—at the end of all this labor and expense,—that the question is no better off than it was when started, is almost to confess incompetency in this matter."

In *Hancock v. Elam*, 3 Baxt. (Tenn.) 33, the judge ordered the jury locked up until they should agree, not allowing them to have dinner. Held error.

Spearman v. Wilson, 44 Ga. 473, held: "The court erred in overruling the motion for a new trial, upon the ground that, after the jury was brought in and answered they had not and were not likely to agree, he stated to them that if they did not bring in a verdict very soon he would make arrangements to carry them to Greensboro. This question was decided in 31 Ga. 625."

In 16 Am. & Eng. Enc. Law, 522, the rule is said to be that "language on the part of the court, the obvious tendency of which is to coerce an agreement on the part of the jury, affords grounds for a new trial. To insist too strenuously upon the necessity of an agreement may have such effect."

Terre Haute & Ind. R. R. Co. v. Jackson, 81 Ind. 19, 24, was an appeal from a decision overruling a motion for a new trial. Judgment was reversed, and a new trial granted, upon the ground of coercion. After the jury had retired and been out nine hours, the trial court, without consent of the appellant, "caused the jury to be informed through the bailiff having charge that, if they did not agree upon a verdict, the court would keep them until Saturday night, a period of four days, to which action of the court the defendant at the proper time, as soon as her attorneys learned of such action, objected and excepted." "The action of the court cannot be justified. It constituted, as it must have been intended it should, a kind of coercion upon the jury, which was inconsistent with their proper independence. . . . A plain error was committed. Its plain tendency was to influence the jury."

Berry v. People, 1 N. Y. Cr. R. 43, 47, reported in memorandum (77 N. Y. 588), is not at all in conflict with the trend of all recent authority upon this question. In that case the jury,

after being charged, retired for deliberation, and upon returning to the court asked for further instructions, and then announced their inability to agree upon a verdict. The recorder, addressing the jury, said: "I would discharge you, but under my sense of duty I cannot. After a few days the case has been presented to you, thoroughly argued and tried. Witnesses were examined and cross-examined. I don't care what you find, guilty or not guilty; it is perfectly immaterial to me. But I say it is my duty, if you cannot agree, that I shall lock you up for the night. That is a most ungrateful thing to do to any jury. As I told you on Friday night, I didn't want you detained from your families, and I do not now. If you cannot agree, I shall order an officer to take you in charge. I will give you fifteen minutes, and see if you can arrive at a conclusion." But for the expression of the trial judge, "I shall lock you up for the night," his remarks would have presented no ground for criticism. This court was of the opinion that the trial judge did not intend to coerce the jury; that he sought merely to convey the idea that they would have to remain over night at the court. This court said in its *per curiam* opinion: "The alleged threat to lock up jurors if they failed to agree was, we think, only intended as a statement that the jury would have to remain over night, as the court would adjourn. Nothing like a threat of imprisonment or punishment could have been intended." The decision of the court, therefore, was that there had been no attempt at coercion, the language complained of not being susceptible of a construction that would give it that effect with the jury, and not that a judgment would be allowed to stand either where the trial court had attempted to coerce the jury, or the language used by him was of such a character that it probably had that effect. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, and *Taylor v. Jones*, 2 Head (Tenn.), 565, are in line with cases cited.

Reference has now been made to nearly all the cases which I have been able to find, of comparatively recent date, and they establish that the old rule permitting coercion of a jury in order to secure a verdict has been swept away; that, under our present method, the independence of a juror is respected. An at-

tempt to drive the members of a jury into an agreement is beyond the power of the court, and an obvious effort to effect such a result demands a new trial.

In this case we can well understand the anxiety of the learned judge, who presided at the trial, to have it ended by a verdict of a jury. The trial had lasted nearly seven weeks; it had been a severe strain upon the jury to be kept together all that time; the expense had been exceedingly great for so small a county; and to have all this inconvenience, labor, and expense borne for nothing seemed a most unfortunate result, and one to be avoided if possible. But in the attempt to avoid it the learned judge, as we think, after a very careful consideration of the subject, fell into error, and, as a result, very likely coerced some members of the jury into an agreement with their fellow members against their own personal convictions.

Some of the grounds upon which this conclusion rests will now be given.

At 8:30 p. m. of the 11th day of March, 1897, the jury retired to consider a case, the trial of which had consumed nearly seven weeks, during all of which time they had been kept together. All of that night and until 11:30 a. m. of the next day the jury were presumably engaged in discussing the evidence, but at the hour last named they came into court and asked two questions about evidence. The information asked for was furnished by reading a portion of the stenographer's minutes. At 3:25 p. m. of the same day the jury came into court and announced that they had not agreed upon a verdict. The court then addressed the jury upon the importance of a decision of the question submitted to them, concluding as follows: "It is for the interests of all concerned and public justice that there should be a decision of this case, so that the question shall be put at rest. I cannot hear of a disagreement of this jury. You must retire, gentlemen." The jury at once retired, and two hours later asked for further instructions, which were furnished by reading from the stenographer's minutes. The next day, at 12:45 p. m., the jury presented to the court a written communication, which read as follows: "The probability or even possibility of this jury ever agreeing is impossible, in my opinion. [Signed] Geo. J. Holden, Foreman." For forty hours,

covering two entire nights, this jury had been engaged in the consideration of the testimony in a small room, and now for the first time reported their deliberate judgment to be that an agreement was impossible. The court responded to this communication as follows: "The order will be that you be conducted to your hotel, and that you be brought back for further deliberation. . . . I have made my own arrangements so as to be back at your call, *both for to-day and for some time in the future*, so that this case may be fully disposed of, if there is a possibility for it. . . ." Language more apt to convey to a jury that the hardships of the past forty hours were to be continued for a considerable time in the future cannot easily be imagined. On their return the court addressed them at length, saying, among other things: "I don't know that you fully appreciate the gravity and importance to this community and to the State that a decision should be reached in this matter, and that this important question shall be settled whether the defendant is guilty or innocent. This case has occupied nearly seven weeks, and to say now, at the end of all that time,—at the end of all this labor and expense,—that the question is no better off than it was when it started, is almost to confess incompetency in this matter. . . ."

We suspend quoting from the remarks of the court long enough to again call attention to *State v. Bybee, supra*, in which the court reversed a judgment of conviction because the trial court, in urging the jury to agree, said "that failure to do so would be an imputation on court and jury." In the opinion of the court, written by Judge, now Mr. Justice Brewer, it was said: "No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal consideration should never be permitted to influence his conclusions, and the thought of them should never be presented to him as a motive for action." The position taken by that court meets with our approval, and it is alike applicable to the comment of the trial court in this case that a failure to agree "is almost to confess incompetency in this matter."

Taking up again the address of the court to the jury, who had solemnly announced that an agreement was impossible, we

quote: "I have laid aside my other engagements, so that this case can be attended to, because I appreciate the importance of it, and I would like to enforce upon you an appreciation of the importance of settling this question. It has got to be settled." Later on, but in this same address, the court said: "I know that your room is a narrow place, and that you are a good deal confined there, and for that reason I have arranged with the sheriff that you shall occupy this room from now on until the completion of your labors. Of course, I don't know how long it will take. . . ." The address was followed by an order, entered on the minutes of the court, "that the jury should be conducted to their meals at the usual hours to-morrow, Sunday, and including Monday morning." Monday morning came, and the jury sent word to the court that they had agreed; they had been out for about eighty-four hours without beds or cots; forty of those hours they had been confined in a small room. From the remarks of the court, and the treatment they had received, they had every reason to believe that a still longer confinement on chairs and hard benches was in store for them,—a physical strain such as only strong men could stand. If one or more members of the jury surrendered their convictions to put an end to the punishment they were undergoing, and with an indefinite continuance of which they were all threatened, it is not to be wondered at. Only very strong characters could have longer resisted the importunities of associates and the appeal of their own exhausted bodies for relief from the strain to which they had been so long subjected. Enough has been said to call attention to some of the reasons which have led us to the conclusion that the agreement of this jury should be regarded as coerced. A verdict thus obtained ought not to be allowed to stand in any case, and, least of all, in one involving a human life.

The judgment should be reversed, and a new trial granted. All concur. Judgment reversed, etc.

NOTES (by J. F. G.).—In West Virginia a jury in a criminal case retired about 5:30 p. m., and after dinner the next day, being called in court and additional instructions given, the jury was about to retire again, when a juror suggested that he believed they could not agree, to which the court responded: "I see no reason why the jury cannot

agree upon a verdict in this case." This was held to be reversible error (*State v. Hurst*, 11 W. Va. 54); the following cases being cited in the opinion: *Ross v. Gill and wife*, 1 Wash. 88; *Keel & Roberts v. Hubert*, 1 Wash. 203; *Gregory v. Baugh*, 2 Leigh, 655; *McDowell's Ex'rs v. Crawford*, 11 Gratt, 465; 1 Rob. Per. 338, 344; *Doss' Case*, 1 Gratt. 559. The case is reported in 3 American Criminal Reports, 100.

Two other authorities upon this subject are *People v. Kindelbergher*, 100 Cal. 367, 34 Pac. Rep. 852, and *Kelly v. State*, 33 Tex. Crim. Rep. 31, 24 S. W. Rep. 285. The opinions are given below. In the *Kelly Case* we omit a part of the opinion which does not bear upon this subject.

PEOPLE v. KINDELBERGER.

DE HAVEN, J. The defendant was found guilty of the crime of assault with intent to commit rape, and was sentenced by the judgment of the superior court to imprisonment in the State prison for a term of seven years. The appeal here is from the judgment, and is brought to this court upon the judgment roll alone, without any bill of exceptions. The jury retired to deliberate upon their verdict at nine o'clock in the evening, and, not having agreed, the jurors, upon their own request, were brought into court at ten o'clock in the forenoon of the next day, when the following proceedings took place: "*The court*: Well, upon what point do you desire instruction or points? *A juror*: By request of the jurymen, I would ask if there could be any other form of verdict in the case? *The court*: Is that all? *A juror*: That is all, except that we are unable to agree. No prospect of agreeing. *The court*: In reply to the latter part of the statement—that the jury are unable to agree, and that there is no prospect of their agreeing—the court has this to say: That, in view of the testimony in this case, the court is utterly at a loss to know why twelve honest men cannot agree in this case. Let me have that information, please. In that connection, further, I have this to say: That, in my short experience upon the bench, I have occasionally been associated with juries where some jurors, having an idea that they are smart men, prominent men, with large heads and big capacity, on going to the jury room, take occasion to express ill-digested and rapid opinions upon the case, and then stick to these opinions, right or wrong, unreasonably refusing to listen to the opinion and arguments of their fellow jurors, and so hang a jury. I have on some occasions, having something of a personal knowledge of jurors on the jury, taken occasion to caution the jurors against that course, and to say that jurors ought to go into the jury box without prejudice, without fear, without favor, with a desire to arrive at the truth, to sift and digest the testimony carefully and conscientiously, and not stubbornly to express an ill-digested opinion, and stick to it. I repeat, gentlemen, that I see no reason on earth why a jury in this case, upon this testimony, cannot agree."

In thus addressing the jury, the learned judge of the superior court committed an error to the prejudice of the defendant. Nothing can be clearer than that in this charge the judge informed the jury that he had a fixed and definite conviction in regard to the verdict which they

ought to return, and that in his opinion the evidence to support such conclusion was so plain and satisfactory that honest and intelligent jurors, who had heard the testimony, ought not to disagree as to its weight and effect; and we think the jury understood, or at least may have understood, from these unguarded remarks, that in the opinion of the judge the defendant was guilty, and that such should be the verdict. When, upon the trial of a defendant, the evidence is clearly insufficient to justify a verdict of guilty, it is the duty of the judge to so inform the jury, and to advise a verdict of acquittal. This power is sometimes exercised by courts, and is one so frequently invoked in the trial of criminal cases that its existence may be regarded as a matter of common knowledge upon the part of jurors of ordinary intelligence and experience; and this fact is not to be lost sight of in considering the impression likely to have been made upon the jury by the charge of the judge in this case. To any one knowing that it is the duty of the court to advise an acquittal if the evidence is such that, in the opinion of the judge, twelve honest men would have no right to convict him, the remarks of the judge in this case could not fail to create the impression that he thought the jury ought to convict upon the evidence before them. But it is not necessary that we should be able to say that the jury must have so understood the charge. Unless it appears that it could not have been so understood, we cannot say that the charge was without prejudice to the defendant. The court has no right, except when advising an acquittal, to give any expression of its opinion as to the weight of evidence, or to tell the jury that the evidence is so clear that they, as honest men, ought not to disagree, which is in effect the same as telling them that there is no conflict in the evidence, and that, as honest men, they can render but one verdict. In a subsequent part of the charge the learned judge did inform the jury that they were the sole judges of all questions of fact, and of the credibility of the witnesses, and that the court had no right to trench upon their province in this respect; but the error already noticed in the previous part of the charge was not cured by this subsequent statement. The fact still remained impressed upon the minds of the jurors that it was the opinion of the judge that there ought to be no disagreement, and that the testimony would justify but one verdict. Judgment reversed, and cause remanded for a new trial.

McFARLAND and FITZGERALD, JJ., concurred.

KELLY V. STATE.

SIMKINS, J. Appellant was convicted of seduction, and his punishment assessed at two years in the penitentiary.

1. . . .

2. We think that the remarks of the court were, under the circumstances of this case, calculated to injure appellant. It is shown by the bill of exceptions that after being out nineteen hours the jury were brought into court, and, in answer to questions, answered that they "had not disagreed as to the law," whereupon the court remarked that "it seems strange you would fail to agree, when there is so little conflict in the evidence. If it was a long, complicated case, with con-

flitting testimony, the court could readily see a cause for failure to agree," etc. In his comment on the bill of exceptions, the court says: "The court never intimated to the jury regarding any fact testified to in the cause, and never told the jury that they must render a verdict, but urged them to consider the evidence, apply it to the law, and render a verdict accordingly." It is true the court never intimated its opinion regarding any one fact in the case, but the trouble is its remarks tended to sweep away the defense in bulk. The only conflicting testimony was that establishing the defense of a want of chastity, and non-promise of marriage, which the court states to the jury is very little. That, perhaps, was true, but the court was forbidden to say it. Code Crim. Proc., art. 729. It certainly seems to have quickly unhung the jury. It is the safer and fairer plan, when the court ascertains that the jury are hung on a question of fact, to send them back without remark. The judgment is reversed, and cause remanded.

STEWART v. PEOPLE.

173 Ill. 464—50 N. E. Rep. 1056.

Decided June 18, 1898.

LARCENY: Elements of—No consent in larceny.

1. Where the owner of property voluntarily parts with its possession there can be no larceny, as that crime always involves the taking and conversion of property without the owner's consent.
2. Inducing the owner of a draft to part with the title thereto by fraudulent and unfair representations is not larceny where the owner intended to part with such title, though at the time of protesting his unbelief in such representations, and though he afterwards demanded the return of his draft.

Error to the Criminal Court of Cook County; Hon. A. N. Waterman, Judge, presiding. Reversed.

Arnold Tripp, for plaintiff in error.

Edward C. Akin, Attorney-General (*Charles S. Deneen*, State's Attorney; *Harry Olsen*, Assistant; *C. A. Hill* and *B. D. Monroe*, of counsel), for the People.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court. Plaintiff in error was convicted in the criminal court of Cook county of the larceny of a draft for \$50 from Herman Klep-

stein, and was sentenced to imprisonment in the penitentiary. Defendant was a doctor, occupying an office in the Lakeside Building, in Chicago. Herman Klepstein resided near Groton, South Dakota. He came to Chicago December 29, 1897, with a car load of stock, arriving at the Union Stock Yards at four o'clock in the morning. He delivered his stock, and then fell in with Timothy Englehard, who was in the habit of bringing patients to defendant, and receiving some compensation for doing so. Englehard took Klepstein to a store, and persuaded him to be measured for a suit of clothes, and then treated him to a glass of beer, after which they went down town on a street car. On the way Englehard asked Klepstein what was the matter with him, and said that he looked sick, to which Klepstein replied that he was not sick. When they got down town, Englehard assisted in getting Klepstein's pass extended, and said that he had to go to defendant's office to get some medicine for his baby. He persuaded Klepstein to go into the office, and spoke to defendant about medicine for his baby, and then introduced Klepstein, and said that he looked sick,—that his eyes looked bad. The evidence for the People upon which defendant was convicted was substantially as follows: After the introduction, defendant told Klepstein that he looked sick, and he replied that he was not sick. Defendant said that he was a professor, and could tell when people were sick, but could not tell what was the matter until he made an examination. He and Englehard told Klepstein to pull off his overcoat, and Klepstein threw his shoulders back, and they took it off. They then told him to take off his other coat and vest, and pull down his suspenders, and he did so. Englehard then went out of that room, and defendant pulled Klepstein's shirt up around his neck. Klepstein laid down on the examination chair and defendant made a physical examination, and told him that he had heart disease, brain trouble, and piles. After the examination, Klepstein got up, and put on his clothes, and was going away, but defendant said that he could not go until this was settled for; that the treatment had already begun, and would have to be settled for. Defendant then called Englehard back into the office, and said that he and Klepstein had decided on everything but the amount; that he wanted \$150 to treat him, one-half in cash, and

that he would take a note for the rest. Klepstein said that that was more money than he had; that he only had a little money,—a \$50 draft. Defendant asked to see the draft, and Klepstein took it out. Defendant looked at it, and said that was all right, and asked him to indorse it, which he did. Defendant took the draft, and filled out a note for \$150, payable in sixty days, and indorsed the amount of the draft, \$50, as a payment on it. Klepstein signed the note, and defendant took it and the draft. Defendant then wrote a prescription, and they all went down to a drug store, where defendant handed the prescription to a clerk to be filled for Klepstein. The prescription was filled, and the package was handed to Klepstein, who paid the charge of \$3.75 for it. Defendant went out, and Klepstein complained to Englehard, saying that he was not sick, and did not need the medicine. Englehard said that he was sorry that he thought as he did, and proposed to go back to the doctor's office, and see if they could get the draft back. They went to the office, and Klepstein said that he was not sick, and would give defendant \$25 if he would give the note and draft back. The defendant was going out to lunch, and said he had no time, and the parties all took lunch together at a restaurant. Defendant left the restaurant first, and after he left Englehard proposed to go back to defendant's office, and see if they could not get the draft back. They went back again, but defendant refused to give back the draft. The next day Klepstein went again with a friend, and asked for the note and draft, and offered to give defendant \$25 if he would return them. He refused, but gave him the note back, tearing off the signature, and keeping the draft. Klepstein was examined ten days later by another physician, who did not find him afflicted with the diseases defendant claimed existed. A thorough examination developed nothing of any consequence in the way of disease, but, on the whole, the man was in good condition and health. Defendant testified that the contract was entered into voluntarily. The evidence as to the character of defendant and his reputation for honesty and fair dealing as well as veracity was conflicting. A clerk in the drug store testified that Klepstein told him about the arrangement for treatment with the doctor, but said that he was afraid the doctor would not cure him, and that his wife would not be

pleased when he got home. Klepstein admitted that at the time of the examination he told defendant that he would deposit \$200 if he would make him as strong and healthy as he was when he was seventeen years old, but defendant said that he could not do that.

The crime of larceny always includes the taking and conversion of property without consent of the owner. It involves a trespass, and there can be no larceny where there is a consent to the taking of the property with the intention that the possession and title shall pass. Where the owner voluntarily parts with the possession and title, the crime of larceny is not committed. If defendant, by fraudulent and unfair statements and representations, induced Klepstein to voluntarily part with the possession and title of the draft, intending to transfer such possession and title to him, there could be no larceny, no matter what else it might be. *Welsh v. People*, 17 Ill. 339; *Stinson v. People*, 43 id. 397; *Johnson v. People*, 113 id. 99. There is no doubt that such was the fact, and that Klepstein meant to part with the draft absolutely, and to transfer the title to defendant. The only claim made on behalf of the People is that the draft was obtained by force and duress. But the evidence does not sustain this claim. Klepstein indorsed the draft after the examination, and after his clothes were on, and his supposed friend, Englehard, had come back into the office. There was no physical force whatever, and no show of any. Klepstein testified that he was scared, but it is plain that he had no reference to duress, physical force, or threats of violence. The methods employed were disreputable, and Klepstein was overpersuaded and induced to do what he would not have otherwise done, but it was not from any restraint or apprehension of violence. They told him that he was sick, and, although he said that he was not, yet he aided in taking off his overcoat, and took off his other clothing himself, and voluntarily submitted to the examination. After the prescription was written, he accompanied defendant to the drug store, where the prescription was filled, and he paid for it. The only thing that is called a threat is that defendant said that he must settle for what had been done, but he made no attempt to leave the office, and there was no threat of bodily harm or injury, and no compulsion or restraint of his

liberty. He told the clerk at the drug store of the contract between him and the doctor, and his only fear then was that the doctor would not carry out his agreement, and that his wife would be displeased. The evidence did not establish the crime of larceny.

The judgment is reversed, and the cause is remanded. Reversed and remanded.

DEAN v. STATE.

41 Fla. 291—26 So. Rep. 638.

Decided May 16, 1899.

LARCENY: Public taking under claim of right—Sentence.

1. In all cases where one in good faith takes another's property under claim of title in himself he is exempt from the charge of larceny, however puerile or mistaken the claim may in fact be. And the same is true where the taking is on behalf of another, believed to be the true owner. Still, if the claim is dishonest,—a mere pretense,—it will not protect the taker.
2. In charges of larceny, where the taking is open, and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized.
3. Under the provisions of chapter 4026, act of 1891, where the primary penalty imposed for crime is a fine and the costs of prosecution only, the imprisonment for non-payment of such fine and costs should be in the county jail, instead of the State penitentiary.

(Syllabus by the Court.)

Error to the Circuit Court of Jackson County.

Mose Dean, being convicted of larceny, brings error. Reversed.

John H. Carter, for the plaintiff in error.

The Attorney-General, for the defendant in error.

TAYLOR, C. J. At the spring term, 1898, of the circuit court of Jackson county, the plaintiff in error was convicted of the crime of larceny of an ox, and was sentenced to pay a fine of one hundred and fifty dollars and costs, and, in default in the pay-

ment thereof, that he be confined at hard labor in the State penitentiary for the period of six months. A reversal of this judgment is sought by writ of error.

The only error assigned and urged is that the evidence was not sufficient to sustain a conviction. The defense set up was that the ox alleged to have been stolen was not taken with the *animus furandi* necessary to the crime of larceny, but was taken with a *bona fide* belief on the part of the defendant that the ox belonged to him, and that he had a right to take it. Some of the testimony for the State, and the evidence for the defendant, tended strongly to sustain such defense. It showed that the defendant took the ox about midday, openly, in the presence of several persons, whose assistance he procured in capturing it, asserting at the time that the animal was his property, and that he led it off on the public highway to his home in the neighborhood; that he sold it shortly afterwards to another party in the same neighborhood, and the party to whom he sold it worked and drove it around in the neighborhood where the prosecuting and alleged owner lived, frequently driving it to a small town, where the prosecuting and alleged owner had his home. Several witnesses, and the defendant himself, swear positively that the animal belonged to the defendant; that he had raised it from a calf, and still owned its mother. The alleged owner and prosecuting witness testified simply that the animal belonged to him; that he had missed it for about a year, and that when it voluntarily came up to his place it had a bell on, and that one of his employees turned it into his inclosure; that shortly afterwards the defendant's wife and several other parties came to his place, and, after looking at the animal in his pasture, laid claim to the ox as being the property of the defendant. The bell that the animal had on when it came up to the prosecutor's place was shown to belong to the party to whom the defendant had sold the ox. There was no evidence tending to show any concealment on the part of the defendant either of the fact of his having taken the ox, or of his assertion of ownership thereof, or of the fact of his having sold it to the third party to whom he did sell it; and there was nothing to show any alteration or obliteration of the animal's marks, though there was testimony to show that the ox was in the mark of the prosecutor, and not in that of the defend-

ant. There was testimony also to show that the defendant, after the ox had been taken possession of by the prosecuting witness, applied to a justice of the peace for process to recover possession of the animal from the prosecuting witness.

The rule, as laid down in 2 Bish. Cr. Law, § 851, and approvingly cited in *Baker v. State*, 17 Fla. 406, and in *Charles v. State*, 36 Fla. 691, 18 So. Rep. 369, is that "in all cases where one in good faith takes another's property under claim of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim may in fact be. And the same is true where the taking is on behalf of another, believed to be the true owner. Still, if the claim is dishonest,—a mere pretense,—it will not protect the taker." And in *Baker v. State*, *supra*, this court said: "The gist of the offense is the intent to deprive another of his property in a chattel, either for gain, or out of wantonness or malice to deprive another of his right in the thing taken. This cannot be where the taker honestly believes the property is his own, or that of another, and that he has a right to take possession of it for himself or for another, for the protection of the latter." Another rule, clearly and correctly laid down, as we think, in *McMullen v. State*, 53 Ala. 531, is that, "where the taking is open, and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized." Applying these principles to the facts as disclosed by the record in this case, we think that the ends of justice will best be subserved by the grant of another trial to the defendant, as, in our judgment, the evidence gives rise to a strongly reasonable doubt as to the presence in the case of that *intent to steal* that is necessary to make out larceny.

It is proper for us to point out another error in the sentence imposed, though it has not been assigned as error, and no notice of it is taken in the briefs of counsel. The primary penalty imposed here was a money fine and the costs of prosecution, but, in case of default in the payment of such fine and costs, the defendant was sentenced to imprisonment in the State penitentiary. This court has repeatedly held that under the provisions of

chapter 4026, act of 1891, where the primary punishment imposed was a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the State penitentiary, for nonpayment of such fine and costs. *Bueno v. State*, 40 Fla. 160, 23 So. Rep. 862; *Eggart v. State*, 40 Fla. 527, 25 So. Rep. 144.

The judgment of the court below is reversed, and a new trial awarded to the defendant.

NOTE.—*Possession of stolen property—Sufficient for the defendant to raise a reasonable doubt as to his possession of it being felonious.*—In the late case of *State v. Miner*, 107 Iowa, 656 (1899), one instruction was that if the jury was satisfied beyond a reasonable doubt that the prosecutor was the owner of the property charged to have been stolen; that it was stolen, etc.; and further, that, soon after the theft of it, this identical property was found in the possession of the defendant,—then this would be presumptive evidence that the defendant was the thief, and that he was guilty of the charge made against him,—“unless the defendant has explained to your satisfaction his possession of the property, and that he came by it honestly.” It was held that this instruction was faulty, because it was violative of the principle that the defendant is not required to explain to the satisfaction of the jury that his possession was honestly obtained, but that it is sufficient if his explanation raises a reasonable doubt as to whether the property was honestly obtained. Citing 74 Iowa, 561; 72 Iowa, 500; 65 Iowa, 240.

Counsel for the State objected to reviewing this instruction, because appellant's abstract did not show that all of the evidence was before the court. It was held that this objection was not sufficient to put in issue the correctness of the abstract; but that, further, the instruction stated a principle of law that could be considered *abstractly*, as well as when applied to facts.

STATE V. KOERNER.

8 N. Dak. 292—78 N. W. Rep. 981.

Decided April 29, 1899.

LARCENY: *Intoxication bearing on the question of intent.*

1. Voluntary intoxication of a defendant is never to be considered by the jury for the purpose of justifying or excusing the commission of a crime which has in fact been committed.
2. Section 6815, Rev. Codes, which provides that the intoxication of one accused of crime may be considered by the jury in determining the particular purpose, motive, or intent with which the acts

were committed, when such purpose, motive or intent is necessary to constitute a particular species or degree of crime, construed, and *held*, that larceny, which is a crime requiring the existence of the specific intent to deprive another of the property taken to constitute the crime, is included thereunder, and that the intoxicated condition of the defendant may be shown, to be considered by the jury for the purpose of determining whether this intent actually existed.

3. The defendant, as for a defense, offered to show his intoxicated condition at and just prior to the commission of the alleged larceny, as bearing upon the existence of the intent. *Held*, that the rejection of the evidence was error.
4. *Held*, further, that the purpose of the admission of this class of evidence is not to justify or excuse the crime, but to aid the jury in determining whether, in fact, the crime has been committed. (Syllabus by the Court.)

Appeal from District Court of Cass County; Hon. Charles H. Pollock, Judge.

Joseph Koerner, being convicted of larceny, appeals. Reversed.

A. T. Cole, for the appellant.

Fred B. Morrill, State's Atty., for the State.

YOUNG, J. The defendant was tried and convicted of the crime of grand larceny in the district court of Cass county at the November, 1898, term. Thereafter a motion for a new trial was made on his behalf. This was denied, and on December 6, 1898, he was sentenced to one year in the State penitentiary.

This appeal is based entirely upon errors of law. While the specifications of error are several in number, we need not treat them separately in this opinion; for they are either rendered unimportant, or are determined, by the conclusion which we have reached as to the one error of the trial court in entirely excluding all evidence offered by the defendant to show his intoxicated condition at the time of the alleged offense. At the close of the State's case this offer of testimony was made: "The defendant now offers, as his defense in this action, to show by competent witnesses that he had been under the influence of intoxicating liquors for a number of days just prior to the commission of the alleged offense, and was at that time, and had been so at the time, and was at that time, in a condition not to know what he

was doing, or to have control of his will, and that he was incapable of forming or executing an intent to commit any crime whatsoever, by reason of his condition at that time from intoxication, and from his general condition from the effects of previous intoxication." This offer was rejected by the court, upon objection of the State's attorney, made on the ground that, "under the laws of this State, intoxication is no excuse for the commission of a crime, under section 6815, Rev. Codes." It appears elsewhere in the record that defendant's intoxicated condition had extended over a period of not more than six days. It was plainly a case of voluntary intoxication, and not insanity resulting from long-continued and excessive indulgence in intoxicating liquors, which is a condition always distinguishable from voluntary intoxication. The court's refusal to receive this testimony is assigned as error. The manner of the offer of testimony by the defendant is treated by counsel for the State as sufficient, and it will be so considered, without expressing an opinion upon that point. We feel that we should also disregard the language of the offer, so far as it appears to restrict it to the one purpose of showing incapacity to form an intent, and treat it, as counsel for the State has done, both in his oral argument and brief, as presenting for our determination the broader question whether, in a larceny case, the defendant has a right to offer evidence to show his intoxicated condition at the time of the commission of the acts, as bearing upon the existence of the element of intent. If such evidence is admissible for that purpose, to aid in establishing a defense to the crime charged, it should not have been excluded because counsel, in his offer, inadvertently indicated as its purpose a result which may be in excess of the legal effect of the evidence proposed to be introduced.

The legislature of this State has by express enactment declared when and for what purpose the intoxicated condition of one on trial for the commission of a crime may be interposed as a defense, and considered by the jury. Section 6815, Rev. Codes, reads as follows: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent

is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." The first portion of the section just quoted, which in effect declares that acts which are criminal when done by a sober person are just as criminal when done by one in a state of voluntary intoxication, is merely the adoption by the legislature of the uniform doctrine of the courts that voluntary intoxication is never a justification or excuse for the commission of a crime. It is evident, then, that if the defendant did in fact commit the crime with which he was charged, his intoxicated condition would not avail, either to justify or excuse him. This his counsel very properly concedes. But it is urged that the crime was not committed, that the larceny was not complete without the intent, and that the testimony offered should have been received, and submitted to the jury, to be weighed by them in determining whether or not the necessary intent existed. The statute does not make evidence of intoxication generally admissible and for all purposes. The language used plainly indicates that the legislature had in mind distinct classes of crimes, and intended to limit the admission of such evidence thereto, and for the purpose expressed, namely, to those crimes whose species or degree depend upon the existence of a particular purpose, motive, or intent as an essential element thereof, and for the purpose of determining the intent with which the acts were committed. The admissibility of the evidence of defendant's intoxication in this case depends, then, entirely upon whether larceny comes within this classification. Homicide plainly does. In such a case evidence of intoxication is admitted, never to excuse the homicide, but to assist the jury in finding the presence or absence of the particular intent which marks the particular degree. Likewise in burglary it is admissible, not to justify the acts of breaking and entering, but to throw light upon the additional element, the intent to commit some other crime, which is the particular element necessary to constitute this species of crime. In neither case, nor in any case within the classification made by the statute, is the evidence either admitted or considered for the purpose of justifying or excusing the crime, but for the sole pur-

pose of determining whether, in fact, the particular species or degree of crime has been committed.

Are the elements of larceny such as to bring it also within the class of crimes permitting the consideration of evidence of intoxication for the purpose of determining the intent with which the acts are committed? Our answer must be in the affirmative, and our conclusion is that the exclusion of the evidence of defendant's intoxicated condition by the trial court, when considered as offered as a defense to the crime with which he was charged, was error. In reaching this result the fact that larceny is divided into degrees has no weight, for its degrees depend wholly upon the value of the property taken. Our conclusion that it is included is based upon the statutory definition of larceny, which makes the intent to deprive another of the property taken, a particular and essential element to constitute the crime, without which it does not exist, as well as upon the uniform classification of larceny, by text-writers and courts, as a crime requiring a specific or particular intent. 1 Whart. Cr. Law, §§ 51-53, 883; 1 McClain, Cr. Law, § 161; Bish. Cr. Law (4th ed.), § 490; *Mason v. State*, 32 Ark. 238. In *State v. Welch*, 21 Minn. 26, the court said: "In a prosecution for larceny, the act of the prisoner, the mere taking, does not constitute the offense, but the act coupled with the intent to steal; and the question is not, did the prisoner intend to take the goods? but, did he take them *animo furandi*?" In *People v. Walker*, 38 Mich. 156, a larceny case, the verdict was set aside for error in charging the jury as follows: "Even if the jury should believe that the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the alleged offense, it is no excuse for him, and they should not take it into consideration. A man who voluntarily puts himself in condition to have no control of his actions must be held to intend the consequences." Cooley, J., said: "This charge was given in reliance upon the general principle that drunkenness is no excuse for crime. While it is true that drunkenness cannot excuse crime, it is equally true that, when a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. In larceny the crime does not consist in the wrongful taking of the prop-

erty, for that might be a mere trespass, but it consists in the wrongful taking with felonious intent; and if the defendant, for any reason whatever, indulged no such intent, the crime has not been committed." In *Chatham v. State*, 92 Ala. 47, 9 So. Rep. 607, another larceny case, the court said: "When the offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, drunkenness, as affecting the mental state of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent." *Wood v. State*, 34 Ark. 341, also a larceny case, is in full accord with the cases just cited. See, also, *State v. Bell*, 29 Iowa, 318; *State v. Schingen*, 20 Wis. 79; *Pigman v. State*, 14 Ohio, 463; *Lytle v. State*, 31 Ohio St. 196. The only State, so far as we can ascertain, which has excluded the evidence of a defendant's intoxication in larceny cases, is Indiana. *O'Herrin v. State*, 14 Ind. 420, and *Dawson v. State*, 16 Ind. 429, are against the admission of such evidence. The later case of *Bailey v. State*, 26 Ind. 422, however, held such evidence competent, as tending to show whether the defendant was in a mental condition so as to be able to commit the crime. And still later, in *Rogers v. State*, 33 Ind. 543, that court reversed the lower court for refusing to admit evidence to show that the defendant, who was addicted to the use of opium, had at the time of the offense been deprived of his accustomed supply of the drug, upon the ground that the evidence went to show his mental condition, and bore upon the existence of the intent. This case is cited by *Chatham v. State*, 92 Ala. 47, 9 So. Rep. 607, in support of the admissibility of evidence of intoxication in larceny cases. In the latter case the court said: "When the offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent. . . . The decided weight of authority sustains the doctrine that evidence of the condition of the accused, though caused by voluntary drunkenness, is receivable, and may be considered by the jury in determining the question of intent." If the property taken is not taken with the intent to deprive another thereof, the crime of larceny has not been committed, and the

existence of this intent is always for the jury to determine. There is no degree of intoxication, however great, which, of itself, is recognized as rendering one legally incapable of forming a criminal intent. But there may be a mental condition amounting to a species of insanity, superinduced by long and excessive use of intoxicating liquors, which amounts to a legal incapacity to commit crime. In such a case the jury passes upon the existence of that condition, and, if the condition exists wherein the accused is legally irresponsible, the law holds him guiltless of crime.

From an application of a familiar principle that every person is presumed to intend to do that which he does do, and also to intend the natural consequences of his acts, juries very naturally and usually do infer, from the acts entering into the crime of larceny and the manner of their commission, the intent to deprive another of the property taken; but this is by no means a necessary inference, for the intent accompanying the acts may be entirely wanting, or in itself an innocent one. For instance, the property may be taken with an intent to return it, or be taken by mistake, or some intent other than to deprive the owner thereof, in which case larceny has not, of course, been committed. The intent to steal does not follow the act of taking as a legal and conclusive presumption; and we may add that the act of the legislature, in admitting this class of evidence in particular cases where intent is peculiarly the gist of the crime or degree, is not an arbitrary exercise of power, for it rests on the underlying principle that the ultimate object of judicial inquiry in every criminal prosecution is to determine whether a crime has been committed, and to ascertain the guilt or innocence of the accused. And it would seem to us equally justifiable in principle to prohibit a jury from considering evidence of a defendant's physical condition, where it amounted to partial or complete paralysis of his physical powers, and is offered as bearing upon the question whether the physical acts included in the crime were committed, as to exclude from their consideration his intoxicated condition, as bearing upon the existence in his mind of the intent to steal, in view of the fact that the well-known effect of intoxication upon the mind is to impair the normal condition of the mental machinery in varying degrees, and

to produce, in some cases of long-continued and excessive use of intoxicating liquors, such a condition of mind as to amount to legal incapacity. The admission of evidence of intoxication in the cases coming within the statute is solely for the purpose of determining whether, in fact, the species or degree of crime charged has been committed, and should always be so restricted by proper instructions, and never be considered by the jury to justify or excuse crimes which have been committed. For the reasons stated, the order of the district court is reversed, and a new trial granted. All concur.

CADY v. STATE.

39 Tex. Crim. Rep. 236—45 S. W. Rep. 568.

Decided April 27, 1898.

LARCENY: *Horse theft—Drunkenness—Intent—Instructions.*

1. Whether induced by intoxication or other causes, "insanity has a distinct meaning." Mere drunkenness is not insanity.
2. If the property be taken when the defendant was in such a mental condition that he did not know what he was doing, a subsequent appropriation of it will not be theft.

Appeal from the District Court of Falls County; Hon. L. B. Cobb, Judge.

The defendant, being convicted of the larceny of a horse and sentenced to three years' imprisonment in the penitentiary, appeals. Reversed.

Rice & Bartlett, J. J. Swann, and George H. Carter, for the appellant.

W. W. Walling and Mann Trice, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of a horse, and his punishment assessed at three years' confinement in the penitentiary; hence this appeal.

The evidence is uncontroverted that appellant took the horse, which was hitched in a public place in Marlin. He rode said horse out of town in broad daylight, and crossed the river, and

went to William Wheelis', in the neighborhood of Lott. He stopped at Wheelis', and hired to him to pick cotton. After he had remained there about a week, he sold the horse to Wheelis. In about two weeks after the taking of said horse, the owner, Canterbury, recovered him. Appellant presented two defensive theories. He proved by several witnesses that he was drinking on the day of the alleged theft, and was intoxicated. He testified for himself, and stated substantially that he had been drinking whisky during the whole of the day preceding the theft, and at the time of the taking of said horse, he was drunk to such an extent that he did not know what he was doing. He, however, gave a circumstantial account of what he did on that occasion. We quote from his testimony as follows: "I came back from the hotel to Rickelman's saloon, where I got something more to drink. After this I went into the alley back of the saloon, where Jack Bradford's wagon was. Jack wanted me to get back in the wagon, and return to the fish camp. I told him, 'No;' I was going to ride. I went in the alley, and mounted the Canterbury horse, and rode down the alley. Passed Jack Bradford, when he tried to pull me off the horse, and the horse began to rear and plunge. I then rode on out into the street, having no particular place in view; just thought of taking a ride. After riding a distance of eight or ten miles, the air and wind brought me to, somewhat. I had a terrible headache, and my only desire was to get rid of the horse. I remember stopping at some one's house on the road, and asking how far it was to Lott. I tried to follow the direction, but got lost, and went up to a house occupied by William Wheelis. I went and stayed all night there. The next day (Sunday), Mr. Wheelis noticed that the saddle was marked 'T. K. Barton, Marlin, Texas.' He asked me about the saddle, and I told him, 'Yes,' it was made in Marlin. On Sunday night, while we were at the supper table, a negro boy came in and said some one had stolen Mr. Marcus Canterbury's horse at Marlin. On Monday morning, Mrs. Wheelis wanted to ride to Lott, and I told her to take the horse, and ride him, which she did. I was glad for her to do this, for I thought some one would see the horse and know him, and take him. On Monday morning I told Mr. Wheelis I got the horse in Marlin, and asked him what was the

best for me to do about it. He replied that he did not know. After I was there for about a week or such matter, I let him have the horse, so I could get some money to leave the country on. I intended, after I got far enough off, to write to Mr. Canterbury and tell him where the horse was. When I got on the horse at Marlin I was drunk, did not know what I was doing, and the only thought I had was to take a ride. I did not intend and had no idea of stealing the horse."

The defensive theories presented by appellant were: First, that, at the time of the alleged theft, he was laboring under temporary insanity, produced by the recent use of whisky, and so was not in condition to form the fraudulent intent to steal; second, that he took the horse merely for the temporary purpose of taking a ride, with no intent to steal him. The court gave the jury the statutory charge on temporary insanity, produced by the recent use of intoxicating liquor, and instructed them that they could only consider the same in mitigation of the penalty they might assess against the defendant in case they found him guilty. In this connection, he further instructed the jury as follows: "If, under the evidence, you believe the defendant, at the time of taking the horse, was in such a condition of mind as that he was not capable of or did not possess the specific intent to defraud the owner of the horse, by depriving him of the value thereof, and appropriating the same to his own use or benefit, then you will not convict him, unless you further find and believe from the evidence that afterwards defendant's mind was restored to such condition as that he was capable of and had the intent then and there to deprive the owner of the horse or its value and to appropriate the same to his own use or benefit, and that, acting under such intent, he retained possession of the horse, or sold him to Wheelis, intending to deprive the owner of the value of the horse, and to appropriate same to his (the defendant's) use or benefit. So, if defendant did not have the intent to steal when he took the horse, such lack or absence of intent being the result of his mental incapacity to form such intent, yet if afterwards, while still in possession of the horse, he became mentally capable of forming the intent to steal, and, while in such last-mentioned mental state, he conceived and formed the intent to steal the horse, his condition of mind at the time of

taking the horse will not avail to acquit him of the charge. After all, unless the intent to defraud, as above defined, existed in defendant's mind, either at the time of taking the horse or subsequently, as above explained, the defendant is not to be convicted." Appellant excepted to this charge, and requested the court to give the following instructions: "The defendant requests the court to charge the jury as follows, to wit: If you believe from the evidence in this case that the defendant took the horse of the prosecuting witness, Canterbury, but that, at the time of so doing, he did not intend to permanently deprive the owner of the same, but only intended the same for a temporary use, to wit, that of taking a short ride, you will acquit the defendant, even though you should believe the taking was without the consent of the said Canterbury. If you believe from the evidence that the defendant took the horse of Mr. M. U. Canterbury, as charged in the indictment, but that, at the time of said taking, the defendant was so drunk as to be incapable of forming in his mind a fraudulent intent, and did not, by reason of such drunkenness, have such fraudulent intent, you should acquit him, notwithstanding the fact that you may further believe that, after coming to himself, he converted the same to his own use and benefit; and, if you so believe, you will acquit the defendant, or, if you have a reasonable doubt thereof, you will find him not guilty. You are charged that in prosecutions of theft, that the fraudulent intent of the taking is the essential ingredient and gist of the crime of theft, and this intent must exist at the very time of the taking, and that no subsequent fraudulent intent will render the previous taking felonious. So, in this case, if you believe that, at the time the defendant took the horse in question, he did not intend to steal the same, but that, subsequent to said taking, he conceived the idea of appropriating the horse to his own use and benefit, and did in fact so appropriate him, you will find him not guilty; or, if you have a reasonable doubt thereof, you will find him not guilty." Said special charges were refused by the court, and appellant excepted.

We do not believe that the evidence raised the issue of temporary insanity. True, the defendant testified that he had been drinking, and testified that he did not know what he was doing;

yet he testified with great clearness and circumstantiality, giving all the details of the transaction. Insanity has a distinct meaning, and, whether produced by the recent use of whisky or other causes, it has the same meaning. It is not mere drunkenness. The court, however, gave a charge on temporary insanity, produced by the recent use of intoxicating liquor, in accordance with the statute. And if he had stopped there, under the facts of this case, there would have been no error. But the learned judge proceeded further, and told the jury that if he was in such a condition at the time he took the horse as not to know what he was doing, and afterward when he came to himself, he then formed the intent to steal the horse, he would then be guilty. This is not the law. The fraudulent intent to steal must be formed at the very time of the taking. Without this, no subsequent appropriation will be theft. Appellant testified that he took the horse for temporary use, merely to ride, and this statement appears plausible in connection with his subsequent appropriation; and the charge given with reference to the intent to steal the horse formed after the act of taking was calculated to mislead and confuse the jury. The judgment is accordingly reversed, and the cause remanded.

Reversed and remanded.

HALL v. COMMONWEALTH.

106 Ky. 894—21 Ky. Law Rep. 520, 51 S. W. Rep. 814.

Decided June 15, 1899.

LARCENY: HABITUAL CRIMINAL: Former convictions—Evidence—Instructions—Increased penalty—Sentence.

1. Under the Kentucky rule it is not necessary in larceny to instruct on the question of defendant having found the property.
2. The Habitual Criminal Act is not unconstitutional.
3. Under that act the jury should find the fact of former conviction and fix the increased penalty; but defendant is not entitled to a separate trial on that issue.
4. It was error for the court to affix the increased penalty (sentence for life) where the jury had not fixed it, and where the jury had not been fully instructed on that issue.

Appeal from the Franklin County Circuit Court. Reversed.

John W. Ray, for the appellant.

W. S. Taylor, Atty. Gen., and *H. M. Thatcher*, for appellee.

DU RELLE, J. Appellant was found guilty of grand larceny, under an indictment which, in addition to the charge of grand larceny, alleged that she had been twice theretofore convicted of felonies, the punishment of which was confinement in the penitentiary; setting forth the terms and courts at which the former convictions had been had. The evidence of her guilt was circumstantial. It was shown that the prosecuting witness, having divided his money, put \$32 of it in a sock, which he concealed in a tub in the yard of the house where he was staying; that he slept in the same room with appellant, another woman, and two children; that appellant went out into the yard about four o'clock in the morning; and that she made purchases of furniture and other things, and paid her rent, on that day. Evidence was also introduced as to two former convictions, which were both for grand larceny. Objection was made both to the admission of this testimony, and to the unofficial character of the person by whom the records of the former conviction were produced; he being a son of the clerk of the penitentiary, and acting as clerk during the clerk's sickness. Appellant testified to the fact that she found the money, not in a sock, but lying in the path leading through the back yard; that she did not know it was the property of defendant, and, from his statement made the night before, thought he had no money. The court gave the ordinary instruction as for grand larceny; directing the jury that, if they found her guilty, they should fix her punishment at confinement in the penitentiary for not less than one nor more than five years, and gave in addition an instruction that if they found her guilty under the first instruction, and should further believe that she had been twice theretofore convicted of felony, as charged in the indictment, they should so find and state in their verdict.

The court refused to charge the jury specially as to what they must believe in order to find appellant guilty of grand larceny, if they believed that she found the money. This also is urged as ground for reversal. This question has been already ruled

upon by this court, through Judge Paynter, in *Hester v. Com.*, 16 Ky. Law Rep. 783, 29 S. W. Rep. 875, where it was held that the instruction requiring the jury to believe that she did feloniously "take, steal, and carry away" the money was more favorable to the accused than if the court had instructed specially upon the defense that she had found the money, because, "if the jury believed that she did find the money, they could not find her guilty, under the instructions of the court."

It is earnestly urged that it was error to permit the introduction of evidence of former convictions at all until the jury should have first found her guilty under the charge for which she was then being tried; that it amounted to the admission of testimony to impeach her general character, which she had not put in issue, and enabled the Commonwealth to show her to the jury in the light of a common thief, and rebut the presumption of innocence which the law gives her by evidence in chief upon a trial for grand larceny. It is painfully apparent that, with the circumstances shown as to the loss of the money, and evidence of two former convictions for grand larceny, the accused, who is an ignorant negro woman, had not the slightest chance that an average jury would entertain a reasonable doubt of her guilt, while, without the evidence of former convictions, there was a possibility that they might do so. There is a considerable force, therefore, in the proposition urged, that this procedure denied the accused a fair trial of the offense whereof she was accused. But the statute as to habitual criminals (sec. 1130, Kentucky Statutes) seems to have created an additional and higher degree of offense, viz. the commission of a felony, having been theretofore twice convicted of a felony, etc. To show the accused guilty of this degree of the offense charged, it is necessary to show the former convictions; and this, of course, is bound to prejudice the accused,—just as evidence showing malice is bound to prejudice the defendant in a murder case,—but it may be shown to make out a higher degree of the offense, which authorizes the severer punishment. The statute has been held constitutional, and it has been held essential to allege the former conviction or convictions in the indictment. *Stewart v. Com.*, 2 Ky. Law Rep. 386; *Mount v. Com.*, 2 Dav. 93; *Taylor v. Com.*, 3 Ky. Law Rep. 783; *Boggs v. Com.*, 9 Ky. Law Rep.

342, 5 S. W. Rep. 307. The statute requires the jury to find the fact of the former convictions. There is no provision for a separate trial of the fact of former conviction, nor do we think the statute intended there should be one. The law seems to work a hardship, but it is a hardship the legislature alone can remedy. In *Combs v. Com.*, 14 Ky. Law Rep. 245, 20 S. W. Rep. 268, this court, through Judge Lewis, recognized the legality of this procedure, saying: "It was distinctly and sufficiently charged by the indictment, and fully proved on the trial, and also found by the jury, that appellant had been twice before the present offense convicted of a felony, the punishment of which is confinement in the penitentiary; and therefore the penalty of confinement in the penitentiary for life became, according to section 12, art. 1, ch. 29, Gen. Stat. [now section 1130, *supra*], inevitable, and the court could do no less than so instruct, and the jury, after finding the present offense a felony, was bound to render the verdict in pursuance thereof. The validity of that statute has heretofore been sanctioned by this court and it is now needless to discuss the question."

The jury rendered a verdict as follows:

"We, the jury, find the defendant guilty of grand larceny, and fix the punishment at one year confinement in the Kentucky penitentiary. E. M. Wallace, Foreman.

"We, the jury, further find that the defendant was at the April term, 1883, of the Ballard circuit court, convicted of a felony, and that said defendant was again at the January term, 1893, of the Franklin circuit court, convicted of a felony. E. M. Wallace, Foreman."

It is urged that it was error for the court to sentence the defendant to confinement in the penitentiary for life under this finding; that section 1136 specifically requires the jury by whom the offender is tried to fix by their verdict the punishment to be inflicted, within the periods or amount prescribed by law. Upon the other hand, it is insisted for the Commonwealth that by section 1130 it is mandatory that, if convicted a third time of felony, the accused shall be confined in the penitentiary during his life, under the provision, "Judgment in such cases shall not be given for the increased penalty, unless the jury shall find from record and other competent evidence the fact of former

convictions for felony committed by the prisoner in or out of this State." It is argued, therefore, that, as said in the *Combs Case, supra*, the life penalty became inevitable, and that it was the duty of the court, in rendering judgment, to so fix it. Differing from the English system, and from that which obtains in the courts of the United States and in many of the States, our system requires the jury to fix the punishment of the offender, within the limitations prescribed by the statute, and as to such limitations they are instructed by the court. The other system requires the jury only to find the fact of guilt, and the degree of the offense, if it is an offense having different degrees. Upon this verdict ascertaining the fact of guilt, the court proceeds to render judgment within the limitations fixed by the law. Under the old system, the jury have nothing whatever to do with adjusting the punishment to fit the crime. Under our system, it was intended that they should have everything to do with it, so they did not transgress the bounds prescribed. And it may be argued with some plausibility that our system contemplates a consideration by the jury of the punishment to be inflicted under the law, in fixing the degree of the offense of which they find the defendant guilty. It is not our duty to discuss the relative merits or demerits of the two systems. That question is not under discussion. But it is our duty to consider what our own system was intended to effect, and whether a failure to carry out its general design in any particular is prejudicial to any substantial right of the accused whose case is brought before us. On the trial of a criminal case in the federal court, counsel for defense is not permitted to tell the jury what penalty will be imposed if they render a verdict of guilty. In our courts a considerable portion of the argument of counsel for the defendant is frequently devoted to discussing the severity of the punishment, as contrasted with the trivial nature of the offense. Under our system, whether by direct design as to this point, or as necessary to effect another purpose, it is contemplated, at all events, that the jury should know and say what punishment is to be imposed for the offense of which they find the accused guilty. The statute (section 1136) requires them to fix by their verdict the punishment to be inflicted, within the periods or amount prescribed by law. It will not do to say that, the fact of two former convic-

tions being ascertained and found by the jury, it is inevitable that punishment by confinement in the penitentiary for life should follow, and therefore that the court is authorized to so adjudge. If a defendant is found guilty of murder, it is inevitable that he should be hung or confined in the penitentiary for life; but no Commonwealth's attorney would be hardy enough to come to this court expecting to affirm a judgment of confinement for life upon a verdict running, "We, the jury, find the defendant guilty of murder as charged in this indictment." And yet that punishment would be as inevitable from that verdict as it is in this. Nor is there anything incompatible or conflicting in the two statutes,—sections 1130 and 1136. By the one it is mandatory that, if convicted a third time of felony, the accused shall be confined in the penitentiary during his life. By the other section it is equally mandatory that the jury shall fix the punishment,—just as mandatory that the jury shall fix the punishment of murder at confinement in the penitentiary for life, at the lowest. This is in strict accord with the theory under which the increase of punishment inflicted upon habitual criminals is reconciled to the constitution. That theory is, as we have said, that a higher grade of offense, is created by the statute. The accused is not sent to the penitentiary for life for committing grand larceny, but for the offense of grand larceny after having been twice convicted of felony, the punishment whereof is confinement in the penitentiary. And so the proper procedure, in order to inflict this seemingly oppressive punishment, is that the jury should find that the accused is guilty of grand larceny; that she has twice theretofore been convicted of a felony, the punishment whereof is confinement in the penitentiary; and that the jury fixes her punishment at confinement in the penitentiary for life. The contrary view is bound to work hardship and oppression. A jury, in a criminal case, like this, is not presumed to know any law as to that case, except that which they are told by the court; for the court is required to give to the jury, in its instructions, all the law of the case. They are properly instructed as to the law of grand larceny. They are also required to find certain facts. As a matter of course, it is their duty to find those facts accurately; but they are not told the effect of their finding, nor can they, under such circum-

stances, be expected to realize the importance of it. Under the instructions as to grand larceny, they find the accused guilty, and fix her punishment at a year's confinement in the penitentiary,—one would think, an ample punishment for stealing \$32, under the circumstances as they appear in this case. But they find, in addition,—without dreaming, so far as this record shows, of the effect of that finding,—a fact upon which, according to the Commonwealth's contention, the court inevitably sentences the accused to confinement in the penitentiary for life. It may be urged that, for securing unprejudiced action by the jury in their finding of such facts, it is better that they should not know the effect of their finding. But our system requires them to know it. The case of *Chenowith v. Commonwealth* (Ky.), 12 S. W. Rep. 585, is not incompatible with this view, for there the jury were evidently instructed as to the effect of finding the existence of former convictions. Their verdict showed it. By an error in computation, the jury fixed the punishment at more than this court thought it should have been. The trial court rendered judgment in accordance with the verdict, and this court reversed the case, with directions to render what was considered the proper sentence. Nor is there any conflict whatever with this doctrine in the recent case of *Herndon v. Commonwealth* (decided by Judge Hobson), 48 S. W. Rep. 989. There the jury were instructed that if they found the defendant guilty, and also found that he had been twice previously convicted, as required by the statute, they should fix his punishment at confinement in the penitentiary for life. Their verdict found him guilty as charged, and fixed his punishment at confinement in the penitentiary for life. It was accordingly held that a substantial compliance with the requirements of the statute as to finding the fact of former convictions had been had, because, under the instructions, the jury could not have fixed his punishment as they did, except by finding the fact of the former convictions. For the reasons given, the judgment is reversed, with directions to render sentence on the verdict, fixing the punishment at one year's confinement in the penitentiary.

STATE V. LIGHTFOOT.

107 Iowa, 344—78 N. W. Rep. 41.

Decided January 26, 1899.

MALICIOUS MISCHIEF: *Grand jury—Indictment—Malice toward the owner—Evidence—Instruction as to facts.*

1. The foreman of the grand jury had been the informant before a justice of the peace in the same matter, and was instructed by the judge to abstain from taking any part in the hearing of the matter before the grand jury. He indorsed the indictment as "A true bill." *Held*, that such indorsement does not raise a presumption that he participated in the hearing of the matter by the grand jury.
2. Punctuation does not always control in construing a statute.
3. Malice toward the owner is an essential ingredient in malicious mischief, and should always be alleged in the indictment.
4. The indictment being for the alleged poisoning of a horse, testimony was admissible that at the same time efforts had been made to poison other horses belonging to the same person, and in various barns, such testimony bearing on the question of malice.
5. It was competent to show that at two conversations between a witness and the defendant, the defendant made general threats that he would have a deal with some one, although the name of the owner of the poisoned horse may have been mentioned in only one of the conversations.
6. There is no error in failing to instruct the jury as to the doctrine of *alibi*, no request for such instruction being made.
7. It was error for the court to instruct the jury that the commission of the crime was proven by uncontradicted evidence, and that the jury must determine whether the defendant committed it. The plea of "not guilty" puts in issue the entire accusation. The fact that a witness is not contradicted does not impose on the jury the duty to believe him. The jury are the sole judges as to what has been proven. "Better abolish the right of trial by jury at once than to permit judges to dictate the facts upon which the verdict must be founded."
8. Several errors, not affirmatively appearing in the record, were not considered.

ROBINSON, C. J., and GRANGER, J., dissenting.

Appeal from the District Court in and for Cedar County;
Hon. H. M. Remley, Judge.

The defendant was charged with exposing a poisonous substance with intent that it should be taken by a horse; being convicted and sentenced to imprisonment in the county jail for nine and one-half months, he appeals. Reversed.

W. G. W. Geiger and R. R. Leech, for the appellant.
Milton Remley, Atty. Gen., C. O. Boling, and W. H. Red-
man, for the State.

DEEMER, J. The indictment charges that the defendant, "on the 3d day of May, A. D. 1894, did wilfully and unlawfully expose a certain poisonous substance, to wit, strychnine, by placing the same in or about the feed trough of a certain domestic animal, to wit, a horse, Mollie Cedar, the intent then and there being that the said horse Mollie Cedar should take the said poisonous substance, the said horse being then and there the property of J. P. Stotler, contrary to the statutes of Iowa and in violation thereof." The evidence tends to show that, in the night following the day specified in the indictment, several horses owned by Stotler were poisoned with strychnine. They were in three barns, and five of them, including the one named in the indictment, were in one barn. From the evidence the jury may well have found that poison was exposed in the feed boxes of the horses, with intent that it should be taken by them.

1. In March, 1896, an information charging the defendant with the offense of which he was convicted was filed with W. G. Busier, a justice of the peace. The defendant was arrested by virtue of a warrant issued on the information, and brought before the justice, and, waiving examination, he gave bail for his appearance before the district court. When the grand jury which acted upon the information and returned the indictment was impaneled, Busier was appointed foreman. He was challenged by the defendant on the ground that he was the magistrate before whom the preliminary hearing was had, the challenge was sustained, and Busier was directed by the court not to take any part in the proceedings when the charge against the defendant was being investigated. The indorsement "A true bill" on the indictment was returned, signed by Busier as foreman, and the defendant moved to set it aside for that among other reasons. The motion was overruled, and of that ruling the defendant complains. Section 4291 of the Code of 1873, as amended by chapter 42 of the Acts of the 21st General Assembly, is as follows: "An indictment cannot be found without the concurrence of four grand jurors, when the grand jury is composed of five

members; and not without the concurrence of five grand jurors when the grand jury is composed of seven members. Every indictment must be indorsed 'A true bill,' and the indorsement must be signed by the foreman of the grand jury." It was thus made the duty of the foreman of a grand jury to sign the indorsement required, although he might not have approved the indictment; and the fact that Busier signed the indorsement in question does not show that he concurred in the indictment, nor that he took any part in the proceedings which resulted in the indictment. Whether it would have been presumed that he did take part in such proceedings, had he not been directed to refrain from so doing, we have no occasion to determine. It must be presumed, in the absence of a showing to the contrary, that he obeyed the direction of the court; and the fact that he performed the statutory duty in signing the indorsement, after the investigation had been completed and the action to be taken determined, does not overcome that presumption.

2. One ground of the motion to set aside the indictment was that the minutes of the evidence of J. W. Carney, whose name was indorsed on the indictment as that of a witness, were not returned with the indictment. The record does not show that the minutes referred to were not so returned.

3. Defendant demurred to the indictment, and his demurrer was overruled. It is contended that this was error, for the reason that the indictment does not charge that the acts were done maliciously. The charge is based upon section 3977 of the Code of 1873, which is found under the head of "Malicious Mischief and Trespass on Property," and reads as follows: "If any person maliciously kill, maim or disfigure any horse . . . or other domestic beast of another; or maliciously administer poison to any such animals; or expose any poisonous substance with intent that the same should be taken by them, he shall be punished," etc. The indictment charges that defendant wilfully and unlawfully exposed a poisonous substance, to wit, strychnine, etc. Does this charge an offense, under the section quoted? It will not do to say that it is a crime for one to expose poison with the intent that the same should be taken by the animals of another. Such act, under the statute, must have been maliciously done, and to charge that the act was unlawful and wil-

ful is not equivalent to saying that it was malicious. *State v. Gore*, 34 N. H. 516; *State v. Hussey*, 60 Me. 410. The term "wilful" means only that the act was done intentionally, or that it was done purposely and deliberately. *State v. Windahl*, 95 Iowa, 470, 64 N. W. Rep. 420; *State v. Clark*, 102 Iowa, 685, 72 N. W. Rep. 296. And the term "unlawfully" implies that the act is done or not done as the law allows or requires. *State v. Massey*, 97 N. C. 465, 2 S. E. Rep. 445. The insertion of the word "unlawfully" does not dispense with the necessity of specifically alleging the elements required by the enacting clause of a statute and by the rules of criminal pleading to constitute the crime charged against the defendant. *Commonwealth v. Byrnes*, 126 Mass. 248, and cases cited. All that is charged in the indictment is that defendant purposely exposed poison, in disregard of law. To our minds, this does not charge an indictable offense. Code 1873, § 4298, says that an indictment must be direct and certain as regards the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. We have held that it is not sufficient to simply charge that an act was unlawfully done. *State v. Railway Co.*, 63 Iowa, 508, 19 N. W. Rep. 299. In construing a similar statute to the one now under consideration, we said in *State v. Harris*, 11 Iowa, 414: "Malice towards the owner of the animal is the ingredient of this offense." See, also, *State v. Williamson*, 68 Iowa, 351, 27 N. W. Rep. 259, and *State v. Linde*, 54 Iowa, 139, 6 N. W. Rep. 168, which apply the same rule to the statute now under consideration. There can be no doubt, we think, that the proper construction of the statute is that, to constitute a crime, the poison must be maliciously exposed. While it may be true that the proper grammatical construction of the statute is that it is a crime to expose poison at any time, and for any purpose, with intent, etc., yet we do not think the use of a semicolon instead of a comma is controlling. Punctuation, if of any significance, is always the last resort. *Shriedley v. State*, 23 Ohio St. 130. The place in which the section is found in the Code is quite significant. If malice is an essential ingredient of the offense, it must be charged, and the use of the words "wilfully and unlawfully" is not sufficient. *Boyd v. State*, 2 Humph. 39; *Thomp-*

son v. State, 51 Miss. 353; *State v. Jackson*, 34 N. C. 329; *Commonwealth v. Williams*, 110 Mass. 401; *State v. Newby*, 64 N. C. 23. The case of *State v. Gould*, 40 Iowa, 372, is not in conflict with this conclusion. The indictment in that case was framed under section 4089 of the Code of 1873, not under 3979, and malice is not an essential ingredient of the crime of nuisance. It is always an essential in cases of malicious mischief. See cases heretofore cited, and *People v. Olsen*, 6 Utah, 284, 22 Pac. Rep. 163; *United States v. Gideon*, 1 Minn. 292 (Gil. 226); *State v. Pierce*, 7 Ala. 728; *State v. Wilcox*, 3 Yerg. 277. The demurrer to the indictment should have been sustained.

4. The appellant complains that he was required to plead and go to trial on the day the demurrer was overruled, and that he was not allowed the time given by law in which to plead and prepare for trial. The record fails to show any objection to what was thus done.

5. On the trial Stotler was permitted to state, notwithstanding objections of the defendant, the number of horses he had in different barns on the night of the poisoning; the condition the horses were in at the time; the number of horses and kinds and arrangement of stalls in the barn in which Mollie Cedar was kept; the number of boxes in that barn in which poison was found; and the number of separate barns in which horses were poisoned; and the number of boxes shown to a druggist named Hampton for examination. We do not find any error in admitting the evidence to which reference has been made. No poison was taken from the box of Mollie Cedar, although it contained some of the preparation in which strychnine was found in other boxes. The testimony in regard to other horses and other barns tended to explain and show the premeditated and malicious character of the act which caused the death of Mollie Cedar.

6. A witness named Alger was permitted to testify that he and the defendant were talking about going to Missouri, and that the defendant said "he was not ready to go yet, until he got through dealing with some of these sons of bitches around here." A motion to strike out that testimony was denied, and of that ruling the defendant complains. He relies upon *State v.*

Millmeier, 102 Iowa, 692, 72 N. W. Rep. 275, as supporting his complaint. There is nothing in that case to indicate to whom or to what the threat of the defendant, which was in question, referred. The threat or statement under consideration in this case was made in a second conversation which the witness had with the defendant. In the first one, which occurred before the horses were poisoned, the defendant stated that "he had a little deal to make with Stotler, and when he did it would be a damned sore deal with him." The witness did not remember that Stotler's name was mentioned in the second conversation, but the jury may well have found the reference to have been to Stotler. Under these circumstances, we think the motion to strike the testimony was properly overruled.

7. Testimony was given in behalf of the defendant which tended to show that he was at his home during all of the night in which the poisoning was done, and he complains because the court did not charge the jury in regard to an *alibi*. No instruction of that character was asked, as in *State v. Porter*, 74 Iowa, 623, 38 N. W. Rep. 514, and the court did not abuse its discretion in not referring to the alleged *alibi* in its charge.

8. In the fourth paragraph of the charge the court stated that the evidence showed, without contradiction, that the crime charged had been committed, and that the jury was to determine whether it had been committed by the defendant. It seems to us that in so doing the court clearly invaded the province of the jury. The rule is well settled that the jury alone can determine questions of fact in a criminal case, and that the judge cannot, either in his charge or at any time during the trial, declare or deny the existence of any fact bearing on the issues and which is in contest. *Moore v. State*, 85 Ind. 90. Our fundamental law guaranties to one accused of crime the right to a public trial by an impartial jury. Sec. 10, art. 1, Const. And, to safeguard his rights in this respect, the legislature expressly provided that "on the trial of an indictment for any other offense than libel, questions of law are to be decided by the court. . . . Questions of fact are to be tried by jury." Code 1873, § 4439. So tenacious have we been for this rule that we have uniformly held that a defendant in a criminal case, be the charge a felony or a misdemeanor, cannot waive a

jury, and submit his case to the court to find the facts. *State v. Tucker*, 96 Iowa, 276; *State v. Douglass*, 96 Iowa, 308, and cases. Now, if the court cannot try an issue of fact by consent, it is difficult to see on what theory he may find some of the facts over the defendant's protest. The plea of not guilty puts in issue every material element of the offense charged, and, if the court may find one fact established, it may find all. We do not think the court has power to instruct that any essential fact is established, notwithstanding there may be no evidence to the contrary. The jury have the right to disbelieve any of the witnesses whose evidence they see fit to reject, and the court is powerless, in criminal cases. *Commonwealth v. Knapp*, 10 Pick. 477. They have power to return a verdict of acquittal in a criminal case, although the evidence clearly shows the commission of the crime and is uncontradicted. In this sense, a jury in a criminal case is judge of both the law and the fact; for the court cannot set aside its verdict and grant a new trial. But, aside from this, as the jury must pass upon all questions of fact, they, of necessity, must weigh the evidence, and in doing this they have the right to disbelieve any and all the witnesses. As said by Garoutte, J., in the case of *People v. Webster*, 111 Cal. 381, 43 Pac. Rep. 1114: "A jury in a criminal case is not bound to believe the uncontradicted statement of a witness as to a fact." That court, in *People v. Murray*, 86 Cal. 34, 24 Pac. Rep. 802, said: "The jury were not bound to take the testimony of any witness as true. From the manner of the prosecuting witness, and the nature of his whole testimony, the jury might have disbelieved him, if the defendant had not introduced any evidence at all. This whole matter was for the jury, and not for the court." Again, that court said, in *People v. Casey*, 65 Cal. 261, 3 Pac. Rep. 874, that the trial court had no right even to tell the jury what the evidence 'shows.' The province of the jury, in passing upon the facts of a case, is a broad one. It is practically unlimited. It is a constitutional right given to the jurors, it is a constitutional duty imposed upon them. They were not bound to take this witness' statement of her age as true. They had the right to disbelieve it, and were not holden to any court for dereliction of duty in not believing it. It would be a matter between them and their consciences alone. It is for

the jury to say when truth and when falsehood come from the mouth of the witness. The conduct of this witness when upon the stand may have shown her to have been lying. Her appearance may have shown her to have been of mature years. The inherent improbabilities of her testimony may have placed it beyond the pale of belief." These rules do not prevent the court from directing a verdict of not guilty, nor from saying that the defendant was not guilty of some particular offense, as in *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 10 Am. Crim. Rep. 168, which contains a most elaborate discussion of the question of jurors being judges of both the law and the fact. But this is quite a different proposition from a statement saying that the evidence does establish a certain fact beyond dispute. To say that a fact is not established in a criminal case, and that, therefore, the defendant is not guilty, is quite different from saying that a certain element of the crime is established by the evidence, and that but one more fact need be established to make out the offense. In the case of *People v. Garbutt*, 17 Mich. 9, Judge Cooley, speaking for the court, said: "The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts and weigh the evidence. The law established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better capable to judge of motives, weigh probabilities, and take what may be called a 'common-sense view' of a set of circumstances, involving both act and intent, than any single man, however pure, wise, and eminent he may be. This is the theory of the law, and, as applied to criminal accusations, it is eminently wise and favorable alike to liberty and justice. But, to give it full effect, the jury must be left to weigh the evidence, and to examine the alleged motives, by their own tests. They cannot properly be furnished for this purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they cannot conscientiously say they believe such an intent to exist." In the case of *Houston v. State*, 4 G. Greene, 437, defendant was accused of the crime of defacing and marking a school-house, and the trial court instructed

that the State had proved all that was necessary with reference to the school district. This court said: "This is error. This was charging the jury upon the weight and sufficiency of testimony. It is not within the province of a judge to instruct a jury as to what facts are proved or not proved. He may explain to them the legal effect of facts, but the facts themselves are to be ascertained exclusively by the jury. Better abolish the right of trial by jury at once than to permit judges to dictate the facts upon which the verdict must be founded. The practice of charging the jury upon the facts may have precedent in some of the older States; but in Iowa it has ever been regarded as dangerous, as a usurpation of power, and as an interference with the rights of parties and the province of jurors." That rule thus so clearly stated has never been departed from in this State, unless it be in one case, to which we will hereafter call attention. See, also, *State v. Donovan*, 61 Iowa, 369, 46 N. W. Rep. 206; *State v. Stowell*, 60 Iowa, 535, 15 N. W. Rep. 417; *State v. Porter*, 74 Iowa, 627, 38 N. W. Rep. 514. In the case now before us there was circumstantial evidence tending to show that some of the prosecuting witness' horses were poisoned, and direct evidence that strychnine was found in some of the feed boxes, not, however, in that where the mare Mollie Cedar was kept. True, she died about the same time that the other horses did, but there is no direct evidence that her symptoms denoted strychnine poisoning. There is evidence from several witnesses that they thought the mare had the colic. There is also evidence to the effect that all the horses appeared as if they had been poisoned. Now, if the jury had found that the mare in question had been poisoned, no court would have disturbed their verdict. But it was certainly a question of fact for the jury, and not of law for the court. The attorney-general contends, however, that defendant admitted while on the witness stand that the horses had been poisoned. This is a mistake. He did, it is true, refer to the horse poisoning as fixing a date or a time, and also stated that he learned of the poisoning at a certain time. But this was simply to fix a date, and to make clear his whereabouts at a particular time. After a careful examination of the entire record, we think we may safely affirm that the defendant nowhere admitted that the horses were in fact poisoned. We are confirmed in this

view by the fact that at the conclusion of the evidence defendant moved for a verdict, and one of the grounds of his motion was that there was no evidence that the animal had been poisoned and no evidence that there was any poison in her trough. If the fact had been admitted, it is strange that such a motion should have been made. In this respect, as well as in some others, the case differs from *State v. Huff*, 76 Iowa, 200, 40 N. W. Rep. 720. There the defendant had a permit to sell liquor, and the State introduced the certificates filed by him showing such sales. These were distinct written admissions by the defendant that he had made sales, and were held to be admissible for the purpose. On this state of facts, the trial court instructed that testimony showed that defendant sold intoxicating liquors at his place of business, and that the only question to be considered was whether he made the sales in good faith, for the actual necessities of medicine. In that case there was a solemn written admission of the defendant that he had sold liquors, and the instruction was held to be correct. Without, at this time, questioning the rule of that case, it is sufficient to say that it is not an authority in support of the instruction given in the case at bar. Many civil cases can be found supporting the rule of the instruction given in this case, but they are not applicable, for reasons which sufficiently appear from what has already been said. We think the instruction was erroneous, and that the question of fact assumed therein to be true should have been submitted to the jury.

9. Lastly, it is insisted that the verdict is not supported by the evidence. In view of the reversal, it is better that we express no opinion upon this subject. For the errors pointed out the judgment is reversed.

ROBINSON, C. J. (dissenting). I concur in the reversal of the judgment of the district court, but do not agree with the conclusion of the majority that the indictment was not sufficient. The section of the Code of 1873 under which it was returned describes three offenses, using the word, "maliciously" in defining each of the first two, and omitting that word in defining the third, which is the one charged in the indictment. The omission cannot be regarded as accidental, and, although per-

haps unwise, should, I think, be given effect. The indictment charges that the defendant did wilfully and unlawfully commit the act described, substantially in the language of the statute, and, according to the rule generally applied in such cases, that was sufficient. See *State v. Bair*, 92 Iowa, 28, 60 N. W. Rep. 486; *Munson v. State*, 4 G. Greene, 483; 2 McClain, Criminal Law, § 833. Of the cases of *State v. Harris*, 11 Iowa, 415, *State v. Williamson*, 68 Iowa, 351, 27 N. W. Rep. 259, and *State v. Linde*, 54 Iowa, 139, 6 N. W. Rep. 168, cited in the opinion of the majority on this question, the first and second involved the maiming and disfiguring, and the third the killing, of domestic animals. In none of them was the offense sought to be charged in this case in any manner involved, and they do not appear to be in point. It is my opinion that the ruling on the demurrer to the indictment was correct.

GRANGER, J., concurs in the dissent.

STATE V. JOHNSON.

7 Wyo. 512—54 Pac. Rep. 502.

Decided October 3, 1898.

MALICIOUS TRESPASS: *Construction of statute—Specific intent.*

1. The malice necessary to constitute the offense of malicious mischief or malicious trespass is something more than the malice which is ordinarily inferred from the wilful doing of an unlawful act without excuse.
2. Statutes such as section 61, Laws 1890, punishing as a crime malicious or mischievous injury to the property of another, are not intended to make every wilful and wrongful act so punishable, but they are devised to reach that class of cases where the act is done with a deliberate intention to injure.
3. In order to bring an offense under the head of malicious mischief, it must appear that the mischief was itself the object of the act, and not that it was incidental to some other act, lawful or unlawful.
4. Where the defendant drove a land of sheep across the uninclosed, unimproved and uncultivated lands of the prosecuting witness, and in doing so did not stop to graze them thereon any longer than sheep do graze while being driven from place to place by the usual and ordinary methods employed to so drive them, in

the absence of any evidence of malice, or that the mischief was the object of the act, *held*, that the facts do not constitute any offense under the laws of the State; and the act of defendant is not within the provisions of section 61 of the Crimes Act of 1890, defining malicious trespass.

Reserved questions from the District Court, Uinta County; Hon. David H. Craig, Judge.

B. A. Johnson was charged with malicious trespass under the statute. There was an agreed statement of the evidence, and the district court reserved four questions for the decision of this court as follows:

1. Is the act of driving a herd of sheep across the land of another, which is uninclosed, unfenced, unimproved, and entirely in a state of nature, a trespass under the laws of this State?
2. Is such an act punishable under section 61 of the Crimes Act, Session Laws 1890?
3. Is such driving a malicious trespass under said section, either with or without notice from the owner forbidding such driving across?
4. Does the information in this case, under the statement of facts as agreed upon, charge any offense under the laws of this State?

The facts stated are in brief that the defendant, in driving a band of sheep from a dipping corral to a neighboring railroad station, drove them over and cross certain uninclosed, unimproved, and uncultivated land of the prosecuting witness, and that the defendant did not stop to graze them thereon for any greater length of time than sheep do graze while being driven from place to place by the usual and ordinary method of so driving them.

John W. Sammon, for the State.

Hamm & Arnold, for the defendant.

CORN, J. (after stating the facts as above). If this were a civil action for damages, a part of the questions would become important which in this case, involving only the construction of a criminal statute, it will be unnecessary for us to decide. It is very well settled that the mere roaming of cattle and other domestic animals upon uninclosed private lands in the Western

country does not constitute a trespass. A distinction has been insisted upon in the case of sheep, which are not permitted to roam at will, but are herded and directed by a shepherd; and it is maintained that when they are driven upon such lands for the purpose of pasturage, it constitutes a trespass for which damages may be recovered by the owner of the land. A decision of the latter question is not required by the facts of this case. The statute invoked by the prosecution is one of a very large class both in England and this country, and provides that "whoever maliciously or mischievously injures, or causes to be injured, any property of another or any public property, is guilty of malicious trespass." Under similar statutes in England, it has been held that in order to constitute the offense the act must be done from malice against the owner. Russ. & Ry. C. C. 373; 2 East, P. C. 1067; 3 Chitty, Cr. Laws, 1132. The doctrine has not been carried to that extent in this country, but the authorities are nevertheless substantially agreed that the malice necessary to constitute the offense is something more than the malice which is ordinarily inferred from the wilful doing of an unlawful act without excuse. The statutes were not intended to make every wilful and wrongful act punishable as a crime, but they are devised to reach that class of cases where the act is done with a deliberate intention to injure. In *Commonwealth v. Williams*, 110 Mass. 401, which was a prosecution for a wilful and malicious injury to a building, the court say: "The jury must be satisfied that the injury was done out of a spirit of cruelty, hostility, or revenge. This element must exist in all those injuries to real or personal property which are enumerated and made criminal in the several statutes. The injury must not only be wilful, that is intentional and by design, as distinguished from that which is thoughtless or accidental, but it must in addition be malicious in the sense above given. The wilful doing of an unlawful act without excuse, which is ordinarily sufficient to establish criminal malice, is not alone sufficient under these statutes. The act, although intentional and unlawful, is nothing more than a civil injury, unless accompanied with that special malice which the words 'wilful and malicious' imply." In *Duncan v. The State*, 49 Miss. 331, which was an indictment for malicious mischief in killing a hog, the

jury returned a verdict: "We, the jury, find the accused guilty of the wilful and unlawful killing of the hog, but not out of a spirit of mischief, revenge, or wanton cruelty;" and this was held to be an acquittal of the accused of the charge in the indictment. So in *Wright v. The State*, 30 Ga. 325, which was an indictment for malicious mischief in shooting a mule, the court say: "The question to be tried was not whether he was *justified* in shooting the mule, but whether his motive in shooting was *malicious*. The question of justification would be the issue in an action for damages against him, but on this indictment the issue was malice or no malice. If he shot from the motive of protecting his crop, and not from either ill will to the owner or cruelty to the animal, his motive was not *malicious* whether it was justifiable or not, and his act was not malicious mischief." In a New Jersey case the defendant was indicted for wilfully and maliciously tearing down an advertisement of sale set up by the sheriff. His defense was that he took it down for the purpose of showing it to his counsel and from no bad motive. The court say: "The word 'maliciously' when used in the definition of a statutory crime, the act forbidden being merely *malum prohibitum*, has almost always the effect of making a bad intent or evil mind a constituent of the offense. The whole doctrine of that large class of offenses falling under the general denomination of malicious mischief is founded on this theory. For example, it was declared by the Supreme Court of Massachusetts in the case of *Commonwealth v. Walden*, 3 Cush. 558, that the word 'maliciously' as used in the statute relating to malicious mischief was not sufficiently defined as 'the wilful doing of an act prohibited by law, and for which the defendant has no lawful excuse,' but that to the contrary, in order to justify a conviction under the act referred to, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or wicked revenge." *Folwell v. The State*, 49 N. J. L. 31. And it seems to be generally held that in order to bring an offense under the head of malicious mischief it must appear that the mischief was itself the object of the act, and not that it was incidental to some other act lawful or unlawful. 14 Am. & Eng. Enc. of Law, 11.

The case of *Daily v. The State*, 24 L. R. A. 724 (51 O. S.

348), relied upon by counsel for the State, was a prosecution under an Ohio statute entirely dissimilar to the one under consideration. It provides that "whoever wrongfully and without lawful authority" injures any tree growing upon land not his own shall be fined, etc. The question whether the act was done maliciously or mischievously did not arise, and even in that case the trial court instructed that if the defendants acted under an honest belief that they had a right to cut the trees, they were not guilty under the statute; but that if they acted heedlessly, recklessly and carelessly they would be liable. And the Supreme Court in affirming the judgment say that if they did so act, the cutting was "wrongful" within the meaning of the statute. The decision has no application to this case, and we have not found any which sustain the view of the counsel for the State. In an Indiana case, where the statute was in the same words as our own, it was contended by counsel as in this case that the act having been clearly proven, malice would be inferred. But the court say such is not the rule where the circumstances attending the commission of the trespass rebut the presumption of malice. *Lossen v. The State*, 62 Ind. 440.

The agreed statement of facts in this case shows that the defendant drove his sheep across the land of the prosecutor to a railroad station, and that in doing so they destroyed only so much of the grass as such a band of sheep would ordinarily destroy in passing over it. There is not only no evidence of malice or that mischief was the object of the act, but the tendency of all the evidence is against such a conclusion. Admitting, therefore, for the purposes of this decision, that the act of driving the animals across the land was a trespass for which damages might be recovered in a civil action, the facts as agreed upon do not constitute any offense under the laws of this State.

No answer is made to the first, second, and third questions, none being necessary, and the fourth is answered in the negative.

POTTER, C. J., and KNIGHT, J., concur.

NOTES (by J. F. G.).—It is a well-settled rule that the statutes relating to malicious mischief only apply to those cases where a wilful injury is done to the property of another as a means of executing vengeance against the owner of the property. 2 East, C. L. 1070-71; 2 Arch. Cr. Pr., Waterman's notes, 708; Chitty's Blackstone, 134, p. 243;

King v. Pearce, 1 Leach, 527; *King v. Shepherd*, 1 Leach, 529; *State v. Peirce*, 7 Ala. 728; *Northcot v. State*, 43 Ala. 330; *State v. B.*, Dev. & Bat. 130; *United States v. Gideon*, 1 Minn. 392, last par.; *State v. Enslow*, 10 Iowa, 115; *Newton v. State*, 3 Tex. App. 245. The American statutes are generally held to have the same object in view as the Black Act in England, which was intended to apply to those cases which were inspired by a desire of revenge. As to the original objects of the statutes in England, see *State v. Wilcox*, 3 Yerg. 278; East, C. L. 1070-71.

In malicious mischief the specific intent is an essential element; so where one who had been fighting was turned into the street, and crossing picked up a stone and threw it at several persons, but, missing them, hit a window, the jury having found that the intention was not to break the window, but to hit one or more of the persons, it was held in *Reg. v. Pemberton*, 12 Cox, C. C. 607, not to amount to malicious mischief.

Prisoners intentionally setting fire to a jail for the purpose of effecting their escape, and not for the purpose of burning the jail, were held, in *People v. Cottrell*, 18 Johns. 115, not to be guilty of arson; so in *Jenkins v. State*, 53 Ga. 33, it was held that burning a hole about a foot in diameter by a prisoner to effect his escape was not an attempt to commit arson. See also *State v. Mitchell*, 5 Ired. 350.

A sailor desiring to steal some rum entered that portion of the ship where spirits were kept, and, getting a lighted match too near the stream, burned the ship; held, not arson. *Reg. v. Falkner*, 3 Cox, C. C. 550.

Driving through the streets of Boston at a greater rate of speed than permitted by the city ordinance, whereby a boy was knocked down, was held, in *Commonwealth v. Adams*, 114 Mass. 323, not to amount to assault and battery.

STATE v. JOHNSON.

58 Ohio St. 417—51 N. E. Rep. 40.

Decided May 10, 1898.

MAYHEM; MAIM: Definitions and distinctions—Common law and statutory—Intent—Pleading—Assault and battery.

1. Maim and mayhem are, at common law, equivalent words, and mean the same thing; therefore, a count in an indictment charging the defendant with maliciously biting the ear of another with intent to maim cannot be supported as to the particular intent charged, as the biting of an ear does not, in law, constitute a maiming.
2. Nor can a conviction be had on such a count for biting the ear with intent to disfigure, under section 7316, Revised Statutes,

permitting a conviction of an inferior degree of the offense charged, as a biting with intent to disfigure is not inferior to a biting with intent to maim, under section 6718 (6819?). Both offenses are of the same degree. *Barber v. State*, 39 Ohio St. 660.

3. Under an indictment charging an injury to the person of another with intent to maim or disfigure, the party may be convicted of an assault and battery, under the provisions of section 7316, Revised Statutes; the offense charged being simply an aggravated assault and battery.

(Syllabus by the Court.)

Exceptions on the part of the State from the Perry County Court of Common Pleas.

David Johnson, indicted and tried in said court for mayhem, was acquitted on the first count and demurred to the second count, which demurrer was sustained; hence these exceptions by the prosecuting attorney to test the accuracy of said ruling, under the provisions of the statute.

T. B. Williams, Prosecuting Attorney, for the plaintiff in error.

Maurice H. Donahue, counsel appointed by the court to argue exceptions. *Thos. B. Williams*, Prosecuting Attorney, in support of exceptions.

MINSHALL, J. David Johnson was prosecuted on an indictment presented by the grand jury of the county, framed on the provisions of sec. 6819, Revised Statutes. The section, so far as it is applicable to this case, is as follows: "Whoever with malicious intent to maim or disfigure, cuts, bites, or ~~splits~~ the nose, ear or lip, cuts or disables the tongue, puts on or destroys an eye, cuts off or disables a limb or any member of another person," is declared guilty of an offense punishable by imprisonment in the penitentiary. The indictment contained two counts. In the first it was charged that he maliciously "did bite the ear of one Reuben Mitchell with intent to disfigure;" and in the second, that he maliciously "did bite the ear of one Reuben Mitchell with intent to maim." A demurrer was sustained to the second count, and, on a plea of not guilty, he was acquitted on the first count. The prosecuting attorney took a bill of exceptions to the ruling on the demurrer to the second count, and prosecutes the same here, under the provisions of the statute in that regard, to test the accuracy of the ruling.

The demurrer presents the question whether the malicious biting of the ear of another can be charged as done with intent to maim.

There is no question, we think, but that maim as a noun, and mayhem, are equivalent words, or that maim is but a newer form of the word mayhem; the difference being in the orthography, and not in the sense. Webster's Unabr. Diet.: "Maim" as a noun is there defined the same as mayhem: "The privation of the use of a limb or member of the body, by which one is rendered unable to defend himself, or to annoy his adversary." This is the definition of mayhem at common law. 1 East, P. C. 393; 1 Whar. Cr. Law, sec. 581. Hence the verb "to maim" is accurately defined in Anderson's Law Dictionary as follows: "To commit mayhem." So, at common law, whatever the injury to any member of the body might be, if it did not permanently affect the physical ability of the person to defend himself, or annoy his adversary, it did not amount to mayhem. Neither the biting of an ear, nor the slitting of the nose, was regarded as an injury of this character. Clark's Cr. Law, 182; 3 Bl. Com. 121. The outrage upon Sir John Coventry, who had been set upon in the street, and his nose slit, for words spoken in parliament, led to the adoption of what is known as the Coventry Act. 22 & 23 Char. II. This act made it a felony, without benefit of clergy, where any one unlawfully cut out or disabled the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disabled any limb or member of any other person, with intent to maim or disfigure him. 4 Bl. Com. 206. Our statute is substantially the same. Any of the injuries there named, done with the intent "to maim or disfigure," is punishable by imprisonment in the penitentiary. Whether it be the biting of an ear, or the putting out of an eye, or the cutting off of a hand, each is alike regarded as a crime, and punished the same way; or, in other words, each is of the same degree of criminality. Sec. 7316, Revised Statutes.

The question in the case is whether the second count in the indictment charges an offense against the laws of the State. It does not, for reasons stated, charge a maiming. Then does it charge the offense of biting the ear with intent to disfigure? Such intent is not averred in the count; and, unless the intent

to maim includes the intent to disfigure, there can be no conviction on the second count for such an offense. Evidence of an intention to disfigure would be a fatal variance from the intent laid in the count. The intent in this case must depend upon the nature of the injury, in connection with the character of the member on which it is inflicted. If the member be not one of use to the person in defending himself, an injury to it cannot be said to have been done with intent to maim. It is provided among other things, in section 7316, Revised Statutes, that, "When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree." In *Barber v. State*, 39 Ohio St. 660, it was held that the offense of cutting with intent to *kill*, and that of cutting with intent to *wound*, are offenses of the same degree, under the provisions of section 6820, Revised Statutes, making it an offense for any one to cut another person "with intent to kill, wound or maim." The indictment charged a cutting with intent to kill. The verdict of the jury was, "Guilty of cutting with intent to wound." The court held that the indictment was not supported by the verdict, for the reason that the offense of cutting with intent to wound is not an offense inferior in degree to that of cutting with intent to kill. By a parity of reasoning, it follows that the unlawful biting of the ear with intent to disfigure is not an offense inferior to that of biting it with intent to maim; and an indictment charging the biting to have been done with intent to maim would not be supported by evidence of an intent to disfigure—there would, in such case, be a material variance between the proof and the allegation.

But this does not exhaust the inquiry, for the question remains, does the count charge any offense against the laws of the State? If so, the court erred in sustaining a demurrer to it. Now, it seems apparent that the malicious biting of the ear of another, whether to maim or disfigure, amounts to an assault and battery,—an offense inferior in degree to an assault with intent to maim or disfigure—the offense charged being simply an aggravated form of assault and battery, of which the defendant could have been convicted on the count demurred to, on proof of such an offense. *Heller v. State*, 23 Ohio St. 582;

Barber v. State, supra; 3 Bl. Com. 121. For this reason the court erred in sustaining a demurrer to it. Exceptions sustained.

STATE v. JACKMAN.

69 N. H. 318—42 L. R. A. 438, 41 Atl. Rep. 347.

Decided July 29, 1898.

MUNICIPAL ORDINANCES: *Constitutional law—Unequal distribution of public burden.*

An ordinance requiring the tenant, occupant or owner, as the case might be, to remove snow from sidewalks adjoining premises, and providing a penalty for failure to do so, is void for the reasons:

(1) It declares a duty which does not bear on all citizens alike, being an unequal division of public expense.

(2) It is in violation of the fourteenth amendment of the United States constitution.

(3) It is an effort to impose a public burden on a few individuals.

Appeal from the Police Court of Concord.

Lyman Jackman, having been convicted and fined five dollars for violating an ordinance, appeals. Reversed.

Sargent, Hollis & Niles, for the State.

Samuel C. Eastman, for the defendant.

BLODGETT, J. Among the various purposes enumerated in the act incorporating the city of Concord, and for which power is expressly given the city council to make ordinances, is that "to compel all persons to keep the snow . . . from the sidewalks in front of the premises owned or occupied by them." Laws 1849, ch. 835, § 17, p. 819. The ordinance in question, therefore, having been authorized by specific and definite legislative authority, and having also been "duly and legally adopted," has the effect of a special law of the legislature within the limits of the city, and with respect to persons upon whom it may lawfully operate, and cannot be declared invalid except for unconstitutionality. 1 Dil. Mun. Corp. (4th ed.), §§ 319-322,

327 *et seq.*; *Tugman v. Chicago*, 78 Ill. 405; *Phillips v. Denver*, 19 Col. 179, 41 Am. St. Rep. 230; *Brooklyn v. Breslin*, 57 N. Y. 591, 596; *St. Paul v. Colter*, 12 Minn. 41. Under our statutes, the duty of keeping highways in repair and free from obstruction by snow or other things that impede travel or render it dangerous is imposed upon the municipalities in which they are situate (P. S., ch. 76, §§ 1, 2); and this duty extends to sidewalks as well. *Hall v. Manchester*, 40 N. H. 410, 415; *Stevens v. Nashua*, 46 N. H. 192, 195. For these purposes, municipalities are empowered to "raise such sum as they judge necessary for each year," to be assessed upon all the polls and estate subject to taxation therein, and may order the same paid in money, in which case "the tax shall be committed to the collector of taxes, and be collected as other taxes," or, if not so ordered, it "may be paid in labor." P. S., ch. 73, §§ 1, 5, 8.

Burdened with this duty, and invested with this power, in respect of highways, we are of opinion that the city of Concord could not by its ordinance impose upon the defendant the labor or expense of removing the snow from the sidewalk adjoining his premises, and which constituted a part of the highway itself. Having contributed his proportional share of the public expense of keeping the highway in a suitable condition for the public travel, we are not aware of any constitutional principle upon which more can be lawfully exacted of him. Nor should there be. A property owner has no other or greater right in or to, or control over, that part of the public street in front of his property than any other part of the highways of the town. All the streets of a municipality are equally free to the general public, who at all times are entitled to the free and unobstructed use of every foot of them. 2 Dill. Mun. Corp. (4th ed.), §§ 659, 683. It is true that the fee of the street may be, and generally is, in the adjoining lot owner; but this can be of no consequence, because the easement over it is in the public. This being so, it is plain that the lot owner has no other interest in the street, *as such*, than any other citizen of the municipality. "The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons traveling on foot, and is as much under the control of the municipal government as the street itself. The owner of the adjacent lot is under no more obligation to

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keep the sidewalk free from obstructions than he is the street in front of his premises. He may not himself obstruct either so as to impede travel on foot or in carriages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow or anything else that might impede travel. Then, upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city? It is certainly not upon the principle under which assessments are made against the owner for building sidewalks in front of his property. The cases are not analogous. Such assessments are maintained on the ground the sidewalk enhances the value of the property, and, to the extent of the special benefits conferred, they are held to be valid." *Gridley v. Bloomington*, 88 Ill. 554, 556, 557, 30 Am. Rep. 567; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640. And, certainly, he cannot be so fined upon any principle of taxation which obtains in this jurisdiction; for "the unconstitutionality of unequal taxation is too plainly declared by our constitution, and too well settled by reported decisions made during the last fifty-three years, to be debatable." *Railroad v. State*, 60 N. H. 87, 94. And, "under the constitution, . . . there is no warrant for the imposition of any other tax than one assessed upon a proportional and equal valuation of all the different kinds of property on which it is to be levied" (*State v. Express Co.*, 60 N. H. 219, 246); and no more can he be upon any principle of division of the public expense, for "the unconstitutionality of an unequal division of public expense among New Hampshire taxpayers has been settled too long, and by too many decisions, to be a subject of debate or doubt." *Id.* 246, per Doe, C. J.

True, the ordinance is not strictly a law levying a tax, the direct or principal object of which is the raising of revenue (*Goddard, Petitioner*, 16 Pick. 504); but it is such a law practically, both in substance and in effect, and should fairly be so regarded. The amount of expense from which the city is relieved by the operation of the ordinance is equivalent to so much revenue derived from taxation. The additional burden to which the lot owners are subjected is none the less a tax because it is ex-

acted in labor, and not in money (P. S., ch. 73, § 8, before cited; Cooley, Tax. 12); and the fine imposed for its nonperformance is as useful to the city as a tax of equal amount. "Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." *Mugler v. Kansas*, 123 U. S. 623, 661. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and such purpose must be taken into consideration in passing on its validity." *Collins v. New Hampshire*, 171 U. S. 30, and authorities cited. "Its constitutionality must depend upon its real character, upon the end designed and to be accomplished, and not upon its title or professions." *Pierce v. State*, 13 N. H. 536, 580.

But it makes no difference, so far as the decision of this case is concerned, whether the ordinance is or is not regarded as a law levying a tax. It undeniably imposes a duty and operates as a law creating a burden which does not bear upon all citizens alike, and which makes an unequal division of public expense among taxpayers, in direct violation of the principle of equality which pervades the entire constitution, and to which all other purposes are incidental and subordinate. *State v. Pennoyer*, 65 N. H. 113, 114, 18 Atl. Rep. 878. And not only is the ordinance a palpable violation of the equality of privilege and of burden guaranteed by the constitution, but it is the taking of private property for public use, without just compensation, and a denial to the persons upon whom it operates of the equal protection of the laws, within the meaning of the fourteenth amendment of the Federal constitution, providing that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. See *Smyth v. Ames*, 169 U. S. 466. The amendment, however, "adds nothing to the rights and liberties of the citizens of this State. It merely confirms to them by Federal sanction the rights secured by the action of their ancestors a century ago. An enactment obnoxious to this provision of the national constitution is, in New Hampshire, no more in-

effective than it would be in its absence." *State v. Pennoyer*, *supra*, 115.

It would seem unnecessary to go further; but the ordinance stands no better on the ground that it is an exercise of the police power inherent in all municipal and State governments, and which, it may be conceded, properly extends to "the protection of the public morals, the public health, and the public safety." *Beer Co. v. Massachusetts*, 97 U. S. 25, 33; *Mugler v. Kansas*, *supra*. Nobody doubts that, when an occasion for its exercise exists, the police power may be invoked in behalf of these objects. But it is entirely plain that the ordinance has no real or substantial relation to any of them. It is not an exercise of restraining or protective power, like the dog law, so called, or the statute empowering towns to require buildings to be provided with such ladders and buckets as may be necessary for use in case of fire, under a penalty of six dollars for every three months' neglect, and other enactments of like character, cited by the State. It is simply an unequal division, for economy and convenience only, of public expense and public burden among a class of taxpayers who have not only once contributed and borne their full share agreeably to their constitutional duty, but who are again required to make contribution, not proportionately and according to the valuation of their property or the benefits they receive, but disproportionately, and solely according to the length of the street lines of their respective lots. This is extortion and inequality, pure and simple—and it is nothing else. See *Curry v. Spencer*, 61 N. H. 624, 631, 632. "An act which operates on the rights or property of only a few individuals, without their consent, is a violation of the equality of privileges guarantied to every subject." *Merrill v. Sherburne*, 1 N. H. 199, 212.

But suppose the legislature, in empowering the city of Concord to adopt the ordinance, intended and understood it to be an act of the protective power, and that it may properly be so regarded, it is, nevertheless, such a manifest violation of rights secured to every citizen of the State by the fundamental law that it cannot be upheld. These rights are "paramount to all governmental authority; and this constitutional principle has never been abandoned." *Wooster v. Plymouth*, 62 N. H. 193,

200, and authorities cited. They are private rights of the subject, and not public rights of the State; and no legislature can invalidate or abridge them. A purely public burden cannot be laid upon a few individuals, as here attempted, by an ordinance or by any other enactment; nor can public expense be apportioned among them arbitrarily, disproportionably, and without regard to the value of their property; nor can they be subjected to double taxation, in whatever form it may be disguised, or be held responsible for the action of the elements, which they could not control, and to the production of which they did not even theoretically contribute.

It is true, nevertheless, that in several of the States all these things are held to be right and proper as a legitimate exercise of the police power (*Goddard, Petitioner*, 16 Pick. 504; *Carthage v. Frederick*, 122 N. Y. 268), or the power to remove nuisances. *Mayor v. Mayberry*, 6 Humph. 368. But even the police power, comprehensive as it admittedly is, has its limitations; and in this State, at least, it is subordinate to the equality of privilege and of burden secured by the bill of rights and guaranteed by the constitution, in clearly-expressed provisions, which mean just what they declare. And in the proposition that, in the exercise of a power to remove nuisances, a private individual may be compelled to remove an obstruction to travel which he did not create, from premises over which he has no control, and which it is the statutory duty of the municipality to keep free from obstruction, we fail to discover any merit except that of novelty.

But there is no occasion to dwell upon these or other somewhat analogous decisions to which our attention has been called. They are plainly not in conformity with the often-declared New Hampshire understanding of the constitutional principle of equality and the reservation of private rights of the subject, which, as before stated, are paramount to all governmental authority; and therefore, while the reasoning on which the decisions referred to are based does not commend itself to our judgment, it is only necessary to say, in the language of Doe, C. J., that "any law or practice of Massachusetts, or any other jurisdiction, American or foreign, in which the rule of equal rights does not prevail, or taxation is an exception to that rule,

is not an authority on which an unequal division of public expense can be made in this State." *State v. Express Co.*, *supra*, 250.

If one public burden may be shifted from the public, and cast upon a certain class of property owners, upon considerations of economy or convenience or peculiar interest, actual or supposed, others may, and doubtless will, be, for "it is a familiar fact that the corporate conscience is ever inferior to the individual conscience,—that a body of men will commit as a joint act that which every individual of them would shrink from did he feel personally responsible; but it cannot be done in this jurisdiction until the constitutional reservations and guaranties intended "as a protection of the subject against the government, and of the weak subject against the powerful subject," are regarded as "glittering generalities" merely, and the reported decisions of three generations of courts are reversed. That time may come, but it has not yet arrived. Appeal sustained. Judgment for defendant.

WALLACE, J., was absent. The others concurred.

NOTE.—Compare with the opinion rendered July 24, 1903, in *State v. McMahon* (Conn.), 55 Atl. Rep. 591, where the above case was cited, but the doctrine announced in it disapproved.

CARR v. STATE.

106 Ga. 737—32 S. E. Rep. 844.

Decided March 15, 1899.

NEW TRIAL: *Newly-discovered evidence.*

When material evidence, not merely cumulative or impeaching in its character, but relating to new and important facts, is discovered after a trial, and it appears that the failure to discover it before trial was not due to a want of diligence, and when the nature of the newly-discovered evidence is such that it might, on another hearing, produce a different verdict, a motion for a new trial, based on the ground of such newly-discovered evidence, should be granted.

(Syllabus by the Court.)

Error to Superior Court of Laurens County; Hon. J. S. Candler, Judge.

William Carr, being convicted of murder, brings error. Reversed.

Howard & Armistead and *Jas. K. Hines*, for the plaintiff in error.

J. M. Terrell, Atty. Gen., and *H. G. Lewis*, Solctr. Gen., for the State.

LITTLE, J. We find it unnecessary to consider at length any of the grounds of the motion for new trial, except those based on newly-discovered evidence. No one was present at the time of the homicide except the deceased and the accused. The State insisted that the circumstances of the killing, with the previous conduct of the accused to the deceased, and his threats, coupled with the nature of the wound, the explanation given by the accused when the homicide was ascertained, and other circumstances, authorized the jury to find the defendant guilty. The accused, on his part, contended that the homicide was the result of accident, and detailed at length the manner in which the wound was inflicted.

We are not prepared to say that the verdict, as rendered by the jury, was without evidence to support it, nor that it was contrary to law. Nor do we think that the court erred in the admission of the evidence complained of, because of the fact that there were no witnesses to the homicide, and the manner in which it was done depended entirely upon circumstances. All facts which went to the nature of the wound, where the ball entered the body, where it made its exit, the nature and condition of the weapon used, were all circumstances which so intimately related to the killing that they should be carefully considered in determining the truth or falsity of the account given by the accused about the real manner in which the wound was received by the deceased. The wound was inflicted with a Winchester rifle, and it was claimed by the accused that at the time the gun fired he was sitting about a foot or a foot and a half from a tree; that the woman killed was lying on the ground on her right side, with her elbow resting on the ground, and her head on her hand;

that he had the rifle across his lap, and did not know that it was even pointing towards her; that his left side was to her face; that the catch of the guard did not hold it very tight, and he was working the guard with his finger when the gun fired. On the trial one witness testified, in rebuttal of this theory, that in reversing the lever of a Winchester rifle the guard would have to be moved six or eight inches, and that before the lever is moved, and it is put in that position, it is necessary that the gun should be cocked. Another witness testified on this subject that he was acquainted with the Winchester rifle, and knew how that weapon is shot, loaded, and reloaded; that it was not possible to fire a Winchester rifle by moving the guard; that there is a safety plug that drops behind the trigger, and when you push the guard back in position it moves the plug; when you throw the guard forward, as soon as you start it forward, the plug drops down behind the trigger, and prevents the trigger from moving; that, when you press the guard down, a little mechanism that moves the cartridge would keep it from falling out of place; that all Winchester rifles are made with that plug; that a Winchester rifle was a patent gun, and that the cartridge would not get in position and fire until you got the guard back. It will be noted that the defendant claimed that the gun, for some unaccountable reason, fired at a time when he was not expecting it, and when he was only working the guard. The object of the evidence introduced evidently was to contradict the account which the defendant gave of the manner in which the gun fired, and to show that a Winchester rifle could not be fired in the manner in which the defendant claimed that this gun was discharged. This evidence must have had a very important bearing on the case.

The newly-discovered evidence, as set out in the affidavit of Robert Shoemaker, is to the effect that he was the owner of the gun with which the deceased was killed; that he had loaned this gun to the accused prior to the homicide; that it was defective in some way in the lock, and, before the occasion of the homicide, the gun, while being handled, had been discharged without any apparent cause; at other times the gun was used for a considerable time without such an accident. It was also, at the trial, an important fact to be ascertained as to where the ball

from the rifle entered the head of the deceased. Under the account given by the accused when he reported the homicide, necessarily the ball must have entered the front part of her head. At the trial, a witness, who was a physician, testified as follows on that subject: "I examined the wound. There was no powder burn about the face. The ball passed between two of her fingers a little to the right of the left eye, and came out about an inch and a half lower than where it went in. I examined the wound on the other side. From what I know of gun-shot wounds, I would say the ball went in from behind. It generally makes a larger hole at the exit than where it goes in. I am a practicing physician. If I had been called there to make a decision as to which side of that head that ball entered, I would have said it went in at the back, and came out in front." This, and other similar evidence tending to prove the same thing, must also have been very material in the case, because, if the ball entered the back of the head, and came out in front, necessarily the account which the accused gave of the position the woman was in, and the manner in which the wound was inflicted, was untrue, and tended to show that it was otherwise inflicted, and that the shot was fired from her rear.

The newly-discovered evidence set out in the affidavit of W. W. Bailey, W. J. Ferdham, T. D. Bailey, I. B. Hitson, A. J. Weaver, and Enoch M. Howard disputes this theory of the State. The last-named five affiants say that they served as jurors on the inquest held over the body of the deceased the day after the homicide; that they did not call a physician to make an examination of the wound on the body of the deceased, but they themselves carefully examined such wound, both in the front and back of the head; that they found what appeared plainly a large hole in the front of the skull, and, after shaving the hair from the back of her head, found that the back of the head was shattered almost to pieces, with pieces of bones and brain in the hair, which convinced these jurors that the ball entered the front of the head. Here, then, was testimony directly negating the theory of the State as to where the ball entered the head, and tending to show, to some extent at least, that the wound might have been inflicted while the deceased was in the position which the defendant described when he called for assistance. These

affiants further say that they never communicated these facts to the defendant, nor to his attorneys, before or at the time of the trial. Accompanying the affidavits of the witnesses by whom this newly-discovered evidence is expected to be proven are the affidavits of accused that he did not know of the evidence of either of these witnesses, nor could the same have been procured by the exercise of due diligence. Also affidavits of the same tenor from his counsel.

It was, of course, possible, with the active diligence which the defendant and his counsel should use in preparing a case of this nature for trial, to have obtained a description of the weapon with which the wound was inflicted from the owner; but, without anything to excite their inquiries in this direction, we are not prepared to say that this information was not obtained because of the want of due diligence. As to the personal examination of the wound made by the five witnesses who served on the coroner's jury, we cannot see how the failure to procure their testimony resulted from any want of diligence. They were not witnesses whose testimony would appear in the report of the evidence made by the coroner, but jurors charged with the duty of ascertaining the cause of death, and who, in the discharge of their duties, made a careful personal examination, the result of which was not communicated to the accused or his counsel before nor at the trial. We therefore think that this alleged newly-discovered evidence should not be disregarded on the ground that due diligence was not shown in procuring it, nor do we think that it is merely cumulative in its character. So far as appears in the record, there was no evidence that the rifle was out of condition, nor any relating to this condition. It is true that during the examination of one or more of the witnesses who testified as to the construction of a Winchester rifle, and the only manner in which it could be fired, questions were asked in relation to whether their testimony would apply to this character of arm if the lock or working parts should be rusty, etc.; but nothing which we have observed, as to the condition of the working parts of this rifle, which would or would not cause it, by other means than those testified to, to be discharged. Certainly, therefore, some of this evidence was not cumulative at all, but new and original, as well as very material. The rule in

relation to the grant of new trials for newly-discovered evidence is that it must be material, not merely cumulative, in its character, but relating to new and material facts, shall be discovered by the applicant after the rendition of the verdict, and brought to the notice of the court within a proper time. When all this appears, it is not absolutely required that a new trial shall be granted. The provision of law is that, when these requisites appear, a new trial may be granted. Penal Code, § 1061. In the case of *Thompson v. State*, 60 Ga. 619, this court ruled that the newly-discovered evidence, in view of the evidence had on a former trial, which might produce a different result, being material, and not merely cumulative, was sufficient to authorize the grant of a new trial. In *Dale v. State*, 88 Ga. 552, this court ordered a new trial on the ground that the ends of justice would be promoted by allowing the defendant an opportunity to avail himself of the newly-discovered evidence. And so we think here. The truth of the matter must necessarily be ascertained by the jury, either through the statement of the accused, or from the circumstances which convincingly show that statement to be untrue. It is an important case to the defendant, and one in which he is entitled to have the benefit of all accessible legal evidence, and it may be that, if this evidence had been before the jury, a different result would have been reached; at least, the jury, having this evidence before them, might have drawn more or less corroboration of the account given by the defendant immediately after the homicide, as well as his statement made at the trial. We do not go to the extent of saying that this evidence should or would have controlled the verdict. The value of it was for the jury. With it before them, they must still decide the truth of the issue. What we do say is that, the evidence appearing to be material, and not merely cumulative, having been shown to be newly discovered, and without want of diligence in its discovery, a new trial should have been granted, in order to allow the jury to pass on it in connection with the other evidence in the case, and to say, after due consideration of all the facts attendant, whether the defendant is or is not guilty. In our opinion, the court erred in overruling the motion for new trial on the ground of newly-discovered evidence. Judgment reversed. All the justices concurring.

MATTHEWS v. STATE.

40 Tex. Crim. Rep. 316—50 S. W. Rep. 368.

Decided March 22, 1899.

NEW TRIAL: Order granting new trial cannot be vacated—Bill of exceptions.

1. An order granting a new trial is final, and cannot be vacated by the court entering it, even at the same term.
2. *Quare?* Can an order overruling a motion for a new trial be vacated?
3. Defendant's counsel, having received notice that the motion for a new trial would be reheard, was not deprived of an opportunity to prepare bill of exceptions.

Appeal from the District Court of Tarrant County; Hon. Irby Dunklin, Judge.

D. L. Matthews, being convicted of cattle theft, appeals. Reversed.

Jas. S. Davis and *O. S. Lattimore*, for the appellant.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of cattle, his punishment assessed at two and a half years' confinement in the penitentiary, and he prosecutes this appeal.

The only question presented for our consideration is the action of the court overruling its former action granting a new trial and then passing sentence on appellant. Accompanying the transcript are certain affidavits of appellant which show the action of the court more in detail than the record. It is shown that on the last day of the term of the court (appellant having been convicted at a previous day of the term of the offense of theft of cattle) appellant's motion for a new trial was granted, and an order to that effect entered upon the minutes of the court. Between nine and ten o'clock on the night of that day, and just before adjournment, appellant was brought into court from the jail, and the previous order of the court granting him a new trial was set aside, and the court then proceeded to pass sentence upon him. The order of the court is in these words: "Now comes James W. Swayne, prosecuting the pleas of the State, also the defendant, D. L. Matthews, in person, and it appearing

to the court that the order heretofore this day made setting aside the judgment and granting a new trial in this cause was made under a misapprehension of the evidence complained of by defendant in his motion for new trial, it is considered and ordered that said order granting new trial is hereby set aside, and for naught held, on the court's own motion, to which defendant excepts. And then came on to be heard the defendant's motion for a new trial, filed herein, and, the court having heard same, and being fully advised in the premises, it is considered and ordered by the court that said motion be, and the same is hereby, overruled; to which action and ruling of the court the defendant in open court excepts, and gives notice of appeal to the court of criminal appeals of the State of Texas; and on application therefor it is ordered that defendant have ten days from and after adjournment of this term of court in which to prepare and file a statement of facts in this cause." While the record does not show that appellant's counsel was notified, the agreement accompanying the affidavits does show that appellant's counsel was notified that the court would proceed to rehear the case, but his counsel failed to put in an appearance. Appellant assigns as error the action of the court in granting him a new trial, and subsequently setting aside this order, and claims that the court was without authority to do this, and that it deprived him of preparing and filing certain bills of exception. It does not occur to us that, inasmuch as appellant's counsel was notified, and failed to appear, he can be heard to make this contention as to his bills of exception.

The important question, however, here presented is as to the action of the court in reconsidering its granting of a new trial, and setting the same aside. This matter was presented to us in this same case on *habeas corpus* at a former day of this term (see *Ex parte Matthews* [No. 1,866; decided February 15, 1899], 49 S. W. Rep. 623), and we there stated that, in our opinion, it was competent for the court to do this, having full power over its orders and judgments made during the term; and we cited a number of civil cases. As to civil cases there is no doubt this doctrine is correct, but we can find no criminal case in which the same rule has been adopted; and, if we recur to our criminal statutes on the subject, it would appear that the

granting of a new trial in a criminal case is a finality, and not subject to a reconsideration during the term. Our statutes provide that a new trial is the rehearing of a criminal action after verdict, before the judge or another jury, as the case may be; and that in no case shall a new trial be granted where the verdict or judgment has been rendered for the defendant. New trials must be applied for within two days after conviction, and all motions for new trials shall be in writing, and shall set forth definitely the grounds upon which the new trial is asked. The State may take issue with the defendant upon the truth of the causes set forth in the motion for new trial, and in such case the judge shall hear evidence, by affidavit or otherwise, and determine the issue. In granting or refusing a new trial the judge shall not sum up or comment on the evidence in the case, but shall simply grant or refuse the motion, without prejudice to either the State or the defendant. The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall not be regarded as any presumption of guilt, nor shall it be alluded to in the argument. If a new trial shall be refused, a statement of the facts shall be drawn, and certified to by the judge, etc. See Code Crim. Proc., title 9, ch. 1. It would appear from these provisions of our Code that the action of the court on the motion ought to be regarded as final, and that the court would have no authority, after he had granted the motion for new trial, afterwards, on the same day or on some other day of the term, to again call the case up, set the order aside granting the motion, and overrule it, and then proceed to sentence the defendant. This view is further manifested by a reference to other provisions of the statute. For instance, suppose at a former day of the term, defendant being on bail, the court should have granted his motion for a new trial, the effect of the order granting such motion would be to enlarge the defendant on his bail, or, after the granting of the order, the defendant would be authorized to give bail. Now, suppose in such case the court, at a subsequent day of the term, desired to recall his former order, and overrule it, what writ can the court issue to bring the defendant before it in order to reconsider the motion for new trial? No writ is provided by the statute, and we take

it that there would be no procedure to arrest the defendant, and bring him before the court, in order to review the former action of the court granting a new trial. So far as we know, this is a case of first impression in this State; and from a reading of the statutes, in connection with other provisions, we believe it was intended that the action of the court in granting a new trial should be final. We are not now holding (because that question is not before us) that it would not be competent for the court, after having overruled the motion for new trial at a former day of the term, to again call the case up, and grant such motion; and we concede that, if the court can do this, it affords a reason why it might do the other. We have examined such authorities of other States as are accessible, but can find none bearing upon this question. In *Lookabaugh v. Cooper* (Okl.), 48 Pac. Rep. 99, in a civil case, the judge, in rendering the decision, held that the action of the court in granting the motion for new trial was final, and no further action could be taken on the same motion; and cites a number of decisions of other States, notably from California, which appear to support the doctrine. He also quotes from Thompson on Trials (sec. 2727), as follows: "It has been held that, after an adverse decision on a motion for new trial, the moving party has no right to file another motion, for the matters embraced in the motion have become *res adjudicata*." As stated before, however, the rule in our State appears to be different. See Sayles' Rev. Civ. Stats., art. 1337, note 2; *Hooker v. Williamson*, 62 Tex. 524; *Grubbs v. Blum*, 62 Tex. 426. But we believe the rule with reference to civil cases in this regard cannot be applied to criminal cases, in view of the provisions of our statute above quoted. While the disposition of this case on *habeas corpus* was no doubt correct, yet what was said by us in that opinion at variance with this decision is overruled. We accordingly hold that the action of the court was erroneous, and the judgment is reversed, and the cause remanded.

Reversed and remanded.

DAVIDSON, P. J., absent.

HORHOUSE v. STATE.

Tex. Court of Crim. App.—50 S. W. Rep. 361.

Decided March 15, 1899.

NEW TRIAL: *Newly-discovered evidence as to insanity.*

Where the evidence is not conclusive as to criminal intent, newly-discovered evidence, showing that the accused was insane, is ground for a new trial, even though with reasonable diligence it might have been discovered previous to the trial.

Appeal from the District Court of Galveston County; Hon. E. D. Cavin, Judge.

Appellant Horhouse, convicted of burglary, appeals. Reversed.

Byron Johnson and Marsene Johnson, for the appellant.

Robt. A. John, Asst. Atty. Gen., for the State.

Brooks, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of five years, and he appeals.

J. S. Brown, the owner of the alleged burglarized house, testified: "About eleven o'clock at night we were awakened by hearing some one in the house downstairs, myself and family being upstairs. The doors had been locked, and every opening in it was closed. Upon hearing the noise, I went to a window, and called out to N. S. Lufkin, whom I saw passing, and asked him to go to a neighbor's and telephone for the police, and tell them that there was a burglar in my house. Lufkin also came with the policemen to my house; some of them going to the back door, and some to the front. When they entered the house, I came downstairs. They arrested the defendant (sitting there), who, when arrested, was attempting to pass out at the front door, which they had opened in entering. He had in his hands a Japanese machete, which belonged to me. I had bought it as a curio, and my wife kept it on the parlor table as a curiosity. The machete is a very sharp knife or Japanese sword, and, if a man be struck a good blow with it on the head, the head and the body might be easily split open to the waist of the man struck. . . . I had other personal property in the house,

such as household and kitchen furniture, silverware, plate, and jewelry, of the value of more than one thousand dollars. Defendant did not have my consent to enter the house."

N. S. Lufkin corroborates the testimony of Brown, and also stated that, as he entered the front door, defendant, who was inside the house, attempted to pass out by him. "When I stopped him, and asked him what he was doing, he said that he was the boy from the back yard." Defendant testified in his own behalf: "I am called by some people Fritz Galvan and by some Fred Galvan, but my name is Fred Horhouse. I have no idea why I went into Mr. Brown's house, and could not tell you what made me do it." The above and foregoing is, in substance, all the testimony introduced.

On the motion for new trial, appellant, through his attorneys, filed as an exhibit thereto a certified copy of the judgment of conviction of appellant, Fritz Galvan, on the 20th day of April, 1898, in the county court of Harris county, of lunacy. They also attach as exhibits the affidavits of his sister and brother, which state facts showing clearly that appellant was crazy.

It is true, there is no diligence shown by appellant to secure the attendance of the witnesses, or to procure the certified copy of the decree of the county court of Harris county; but, if the defense of insanity urged by appellant be true, the question of diligence is not to be considered by the court in passing on whether or not a new trial should be granted. Judge Wilson, in *Schuessler v. State*, 19 Tex. App. 472, uses this language: "It is true that no diligence has been used by defendant to discover and procure this testimony. On the contrary, his desire was that such testimony should not be resorted to.

"If, in fact, the defendant is insane, it could not be expected that he should use diligence to procure the testimony, and the law would not exact it of him. His counsel appear to have used reasonable diligence to obtain testimony, and did obtain some, as to his mental condition, and show good reason why they did not procure the testimony which they show can be produced on another trial. This newly-discovered evidence is certainly material, and calculated, we think, to change the result on another trial. It appears to us probable that the defendant is not a re-

sponsible person, and we think that the law and justice demand that he shall have a new trial."

We think that the evidence in this case clearly shows that appellant is entitled to a new trial, since the exhibits attached to appellant's motion for new trial show that a different result would probably have been reached if the evidence of the insanity of appellant had been introduced.

Furthermore, the evidence of the State is not of that conclusive character on the question of intent such as would ordinarily be required. The evidence does not show that he had any felonious intent. True, he broke into the house through a window, but, after getting in, although the owner of the house made outcry, and had the police telephoned for, yet he stayed there, and never attempted to take anything away from the house or to escape, nor did he offer any resistance when arrested. This, coupled with the exhibits as above indicated, attached to his motion for new trial, constrain us to reverse the judgment.

The judgment is accordingly reversed, and the cause remanded.

DAVIDSON, P. J., absent.

COOPER v. COMMONWEALTH.

106 Ky. 909—21 Ky. Law Rep. 546, 51 S. W. Rep. 789, 45 L. R. A. 216.

Decided June 17, 1899.

PERJURY: *Res judicata*.

An acquittal on a trial for adultery bars a prosecution against the defendant for perjury, charging that in testifying on the trial he denied the alleged carnal intercourse.

HOBSON, J., and PAYNTER, J., dissenting.

Appeal from the Circuit Court of Rowan County.

Appellant Cooper, being convicted of the offense of perjury, appeals. Reversed.

A. T. Wood and R. Blair, for the appellant.

W. S. Taylor, for the appellee.

BURNAM, J. The appellant and one Libbie Purvis were jointly indicted in the Rowan circuit court for the offense of adultery. The trial under that indictment resulted in a verdict of acquittal for appellant. The grand jury of Rowan county thereupon reported this indictment against him, in which it is charged that upon the trial of appellant and Libbie Purvis upon the charge of adultery "he did knowingly, wilfully, and corruptly swear that he had not had carnal sexual intercourse with Libbie Purvis, when same was false and untrue, and was known by him to be false and untrue." The trial under this indictment resulted in a verdict of guilty, and a judgment sentencing appellant to confinement in the penitentiary, which we are asked upon this appeal to reverse.

The principal question to be considered is the effect which is to be given to the indictment, trial, verdict, and judgment of acquittal of appellant under the indictment for adultery, as it is manifest that appellant cannot be guilty in this case if he was innocent of the charge contained in the other indictment.

His guilt or innocence of the offense of having had carnal sexual intercourse with Libbie Purvis was the exact question which was tried in the first proceeding, and as a result of that trial the defendant was found not guilty. In order to convict him in this case, it was necessary for the jury to believe that he was guilty of the identical offense for which he had been tried and acquitted under the other indictment, as it is evident that, if he was innocent of having had carnal sexual intercourse with Libbie Purvis, he was not guilty of false swearing when he stated that he had not had such intercourse with her. We therefore have, as a result of the trial of appellant under these two indictments, a verdict and judgment finding him not guilty of the offense of having had carnal sexual intercourse with Libbie Purvis, and in the second case a verdict and judgment finding him guilty of false swearing when he testified that he had not had such intercourse with her; in other words, the first jury found him innocent of the misdemeanor with which he was charged, and the second jury found him guilty of a felony because he testified that he was not guilty of such misdemeanor. It certainly was never intended that the enginery of the law should be used to accomplish such inconsistent results. It ap-

appears to us from the conflicting character of the testimony in the case upon the question of defendant's guilt or innocence that a verdict of the jury might have been upheld in the first case whether found one way or the other, but certainly the finding of the jury must be conclusive of the fact considered as against the Commonwealth, and preclude any further prosecution which involves the ascertainment of such fact.

A question analogous to the one at bar was considered in the case of *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, the facts in which case are about as follows: Coffey was a distiller, and was proceeded against under a section of the statute for defrauding, or attempting to defraud, the United States of the tax on spirits distilled by him, and the copper stills and other distillery apparatuses used by him and the distilled spirits found on his distillery premises were seized. One section of the statute provides, as a consequence of the commission of the prohibited act, that this certain property should be forfeited, and that the offender should be fined and imprisoned. Coffey was first proceeded against on the criminal charge, and acquitted. Subsequently a proceeding to enforce the forfeiture against the *res* was instituted. The defendant in the proceeding *in rem* relied upon his acquittal under the criminal charge, and Judge Blatchford, in delivering the opinion of the court, said:

"Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue, and determined against the United

States; and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it."

And the conclusion reached in that case is in consonance with principles laid down by the United States Supreme Court in the case of *Gelston v. Hoyt*, 3 Wheat. 246. In the case of *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355 and 538, the court held:

"The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court."

And in the case of *United States v. McKee*, 4 Dill. 128 [Fed. Cas. No. 15,688], the defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without the payment of taxes thereon. He was afterwards sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The court held that the two alleged transactions were but one, and that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty.

And Judge Van Fleet, in his Treatise on the Law of Former Adjudication (p. 1242, § 628), says:

"If there is a contest between the State and the defendant in a criminal case over an issue, I know of no reason why it is not *res adjudicata* in another criminal case;" citing a number of American decisions in support of the text.

Appellant in this case had already been tried and acquitted of the offense of having had carnal sexual intercourse with Libbie Purvis, and the judgment in that case is *res judicata* against the Commonwealth, and he cannot again be put on trial where the truth or falsity of the charge in that indictment is the gist of the question under investigation. It therefore follows that appellant was entitled to a peremptory instruction to the jury

to find him not guilty. For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

HOBSON, J. (dissenting). Appellant, when indicted for adultery with Libbie Purvis, secured an acquittal by swearing falsely that he had not had carnal intercourse with her; and being indicted and convicted of false swearing in giving this testimony, it is held that because he was acquitted in that case he cannot be punished for the crime thus committed. In other words, it is held that if the defendant in a criminal case will swear to enough to secure an acquittal, and does in this manner get a verdict in his favor in that case, he cannot, although clearly guilty, be punished for the perjury or false swearing by means of which he defeated justice. Such a rule puts persons charged with crime, when testifying for themselves, on a different plane from other witnesses and offers an incentive not only to perjury on their part, but to the corruption of justice in other ways to secure a verdict in their favor which will protect them from punishment for both the offense for which they are tried and the perjury committed on the trial. It is certainly anomalous to say that if a criminal attempts by perjury to secure an acquittal and fails in the attempt, he may be punished for the crime; but that if he is successful, no punishment can be inflicted. Undoubtedly it would seem that there is, at most, as sound reason for punishing this grave crime where the ends of justice have been thereby defeated as where the effort to defeat justice has proved abortive.

In Freeman on Judgments, sec. 318, it is said: "The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. An acquittal or a conviction, under an indictment for any offense, is a bar to any subsequent indictment substantially like the former. But in criminal as in civil actions, it is essential that the judgment be on the merits, and not tainted with fraud. Thus going into a favorable court, and submitting to a conviction, in order to escape a severe penalty, is no bar to a *bona fide* prosecution."

The rule as to collateral attack on judgments in civil cases

for fraud is thus stated in 12 Am. & Eng. Ency. of Law, 147-148: "It is a general rule at common law that parties and privies to a judgment may not impeach it collaterally for fraud, though it seems they may prove that the judgment is being fraudulently used for a different purpose than that intended, or that it is based upon a paper fraudulently obtained. This rule has, however, been held inapplicable where no appeal lies from the judgment."

When there is no appeal, and no other way to set aside a judgment obtained by fraud, to hold it conclusive when offered in bar of another action is to allow the wrong-doer to profit by his own wrong. Thus, in *Newcomb's Ex'r v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222, the defendant could not appeal from the judgment, move for a new trial or file a petition to set aside, and this court, sustaining her right to treat the judgment as void when offered in another suit in bar of her action, said:

"Recognizing the general doctrine that judgments of courts of general jurisdiction are not the subject of an attack in a collateral proceeding, it becomes necessary to determine whether this rule, or the reasons upon which it is based, is to be applied to the case before us.

"The rule had its origin from motives of public policy, sustained, as all the authorities concur to show, by the additional reason that the party aggrieved has every opportunity offered him for redress if wrong has been committed; he may appeal, move to set aside the judgment or for a new trial, so long as the court rendering the judgment has any control over it. He may also file his petition to review the judgment, or a petition for a new trial. Such proceedings the policy of the law requires he shall adopt, and will not permit collateral attacks upon such judgments when they may be offered as evidence, or relied on as the final determination of the rights of the parties."

On the same principle, foreign judgments may be avoided for fraud in their obtention, for the reason that there is no other way to correct the matter, and that the ends of justice require this. Freeman on Judgments, sec. 591.

In a criminal case the State cannot obtain a new trial for newly-discovered testimony after the term, and if the judgment bars a prosecution of the defendant for his wilful perjury,

whereby he obtains it, there is no remedy. The ends of justice have not only been defeated, but the foundation of judicial proceedings have been sapped.

The rule, stated by Mr. Freeman above, that a judgment rendered in an inferior court to which the defendant voluntarily goes to escape a severe penalty is not a bar to a subsequent prosecution for the same offense, rests on the ground that he thus perpetrates a fraud on the State, and has been followed by this court in *Carrington v. Commonwealth*, 78 Ky. 83. The fraud in this class of cases is in giving the court jurisdiction; but certainly fraud of this sort is less tolerated in the eye of the law than the abhorred crime of perjury, cheating the court out of the truth, after its jurisdiction has lawfully attached.

In *State v. Swepson*, 79 N. C. 632, the defendant had, by imposition on the court, had a jury impaneled and a formal verdict of not guilty entered, on the ground that the matter had been compromised with the State. This was held no bar to another trial under the same or another indictment. The court said: "The State ought to have some remedy. Guilt cannot be allowed to protect itself by fraud and corruption, or else the tribunals of justice become dens of thieves, and law as administered in them is a machine to punish the weak and screen the powerful. . . . There is a remedy not without precedent or authority for its use, plain, and not of infrequent use, laid down in the elementary works on law, and supported by the adjudications of respectable courts. This remedy is in the court in which the trial was had, and is independent of any action of this court. It is asserted in many text books and dicta of judges and supported by some decisions, that a verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the defendant is a nullity, and may be treated as such; and the person acquitted by such means may be tried again for the offense of which he was acquitted. 3 Greenl. Ev., sec. 38; 1 Whart. Crim. Law, sec. 546; 3 id., secs. 3221-3222; 1 Chitty, Crim. Law, 657."

If the defendant, where his constitutional right not to be put in jeopardy a second time for the same offense is not involved, may be estopped, by reason of his own fraud in procuring the judgment, from relying on the plea of *res adjudicata*, how much

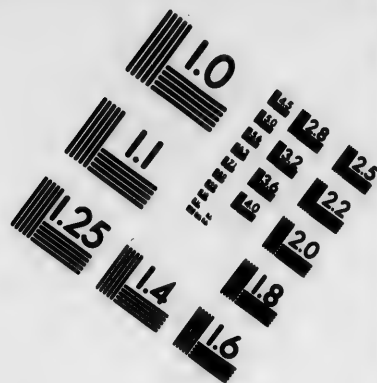
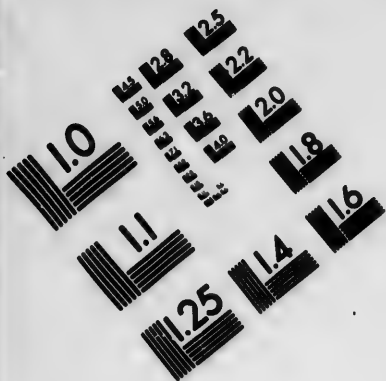
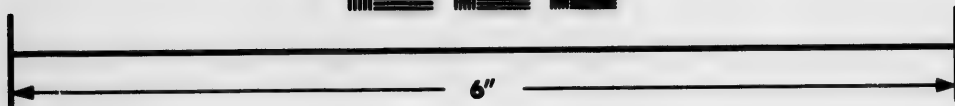
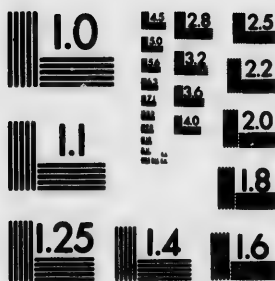


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the more should he be estopped to make this plea to escape punishment for the crime of perjury by means of which he obtained the judgment. There is not a shadow of doubt of appellant's guilt in the case before us, and not to punish him is to lose sight of the principles on which the rule relied on rests.

The opinion is based on the ground that the question whether appellant had had sexual intercourse with Libbie Purvis was litigated and determined on the trial of the indictment against him for adultery, and that the State is concluded by the judgment in that case from litigating with him again this precise question on a charge of false swearing on that trial. None of the authorities cited by the court sustain this conclusion; nor is it sustained by the principles on which the doctrine of *res adjudicata* rests. It rests after all on public policy and convenience. Its design is to protect courts of justice and secure for them respect. It is court-made law and, like other common-law principles, is not to be stretched beyond its reason. The purpose of the rule is to promote the orderly administration of justice, not defeat it. It rests on the ground that the law having provided certain processes for the correction of errors or defects in judgments, the ends of justice require that these should be followed. But it was never intended to assail the right of the courts to protect the administration of justice from perjury, a right which all courts must of necessity possess if judicial proceedings are not to become a solemn farce. Neither the reason, purpose nor spirit of the rule permits its application in such a manner as to destroy respect for courts of justice or make them impotent to punish crime.

For these reasons I dissent from the conclusion reached by the majority of the court.

This dissent which was announced at the time was, by an oversight, not filed before.

PAYNTER, J., concurring in the dissenting opinion.

NOTES (by J. F. G.).—Of the four volumes credited, in the head lines, with reporting this case, only the 106 Kentucky gives the dissenting opinion; the other three give the reversing opinion, and simply note that "Hobson, J." dissents, making no mention of Mr. Justice Paynter's dissent. The court was constituted of seven judges.

The writer of the dissenting opinion concedes that fraud which vitiates a judgment in a criminal case is fraud "in giving the court

jurisdiction," but contends that greater is the fraud when perpetrated by perjury after jurisdiction has attached. Morally he may be correct; but if such fraud can vitiate a judgment where jurisdiction has attached, then a judgment based upon a verdict of not guilty could be set aside, and the original case be retried, notwithstanding the constitutional provision, regulating the practice in many of the States, that no person can be placed twice in jeopardy of the same offense.

It is well settled that if a person appears before a justice of the peace and accuses himself with being guilty of a misdemeanor, and is fined, the judgment is no bar to a future prosecution for the same offense (*Drake v. State*, 68 Ala. 510; *Bingham v. State*, 59 Miss. 529), for, the State not being represented, the proceeding is *ex parte*, and there is no jurisdiction. The same rule applies where a guilty person fraudulently procures another person to file a complaint against him, there simply being an appearance of jurisdiction, but in fact no jurisdiction.

EX PARTE CLEM MCCARVER.

39 Tex. Crim. Rep. 448, 42 L. R. A. 447, 46 S. W. Rep. 936.

Decided June 15, 1898.

PERSONAL LIBERTY: CURFEW ORDINANCE: *Rule for construing ordinances.*

1. Courts are not inclined to question the reasonableness of municipal ordinances passed under a special grant of power; but if an ordinance based upon a general power does not appear to be reasonable, it will be declared to be void.
2. A municipal ordinance, depending for its authority on a general power requiring the ringing of a curfew bell at forty-five minutes after eight o'clock p. m., and declaring it unlawful for any person under the age of twenty-one years, not in the company of parent or guardian, and not in search of a physician, to be on the streets or alleys at fifteen minutes after such ringing, being an unreasonable interference with personal liberty, is void.

Appeal from the County Court of Young County; Hon. O. E. Finlay, Judge.

In a *habeas corpus* proceeding, the relator being remanded, appeals. Relator discharged.

John C. Kay and *P. A. Martin*, for the relator, contended that the ordinance is in violation of the State constitution; citing Const., art. 1, sec. 19, and *Huntsman v. State*, 12 Tex. Crim. App. 619. That the common law gives no such power to

cities. That the ordinance endeavors to make acts criminal which in themselves are not so; and would interfere with minors in attending religious meetings or innocent amusements. That the city, being organized under the Revised Statutes, has no power not expressly granted, etc. Also cites *Ex parte Garza*, 28 Tex. Crim. App. 381; *Galveston v. Looney*, 54 Tex. 523; *Miller v. Burch*, 32 Tex. 210; *Williams v. Davidson*, 43 Tex. 33; *Vosburg v. McCrary*, 77 Tex. 572; *Brenham v. Water Co.*, 67 Tex. 542.

W. W. Walling and Mann Trice, Asst. Atty. Gen., for respondent.

HENDERSON, J. This is an appeal from a proceeding under a writ of *habeas corpus*. It appears in the city of Graham, Young county, the city council have passed what is termed a "curfew ordinance," as follows:

"ORDINANCE No. 30.

"An ordinance prohibiting persons under the age of twenty-one years from remaining or being found upon the streets of Graham after nine o'clock at night.

"Be it ordained by the city council of the city of Graham, in session assembled, that:

"Section 1. Any person under the age of twenty-one years who shall be found upon any of the streets or alleys of the city of Graham at night, and later than fifteen minutes after the ringing of the curfew bell as hereinafter provided, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five dollars nor more than fifty dollars.

"Sec. 2. Be it further ordained, that the foregoing section shall not apply to any person under the age of twenty-one years, who shall at the time of being so found upon the streets or alleys of said city be accompanied by his or her parent or guardian, or to any person or persons in search of the service of a physician, provided such person or persons at the time of being so found is actually executing such errand.

"Sec. 3. Be it further ordained by the city council of the city of Graham, that the city marshal of the city of Graham, at and

on each and every day at eight forty-five o'clock p. m. shall ring or cause to be rung the church bell at the Baptist church in said city, and said bell shall be known as the 'curfew bell.'

"Sec. 4. Be it further ordained, that this ordinance shall take effect and be in force from and after its publication, according to law.

"Approved Feb. 28, 1898.

"J. S. STARRETT, Mayor."

That after said ordinance went into effect the relator, a young man nineteen years of age, was found by the city marshal of the city of Graham on the street more than fifteen minutes after the city marshal had rung the curfew bell at the Baptist church, in said city, on the night of the 18th of April, 1898. That said marshal held and detained him for a violation of said ordinance. He sued out a writ of *habeas corpus*, and, upon an examination of the case, he was remanded by the county judge, and he now prosecutes this appeal.

The question here presented is as to the legality of said ordinance. If it be such a one as the city council had a right to pass, then the relator is entitled to no relief; otherwise he is. It appears that a distinction is made between ordinances passed under an express grant of power by the legislature and ordinances which are merely passed under a general power. As to the former, courts are not inclined to inquire into their reasonableness; but as to the latter, if an ordinance does not appear to be reasonable, the courts will declare them void. See 17 Am. & Eng. Enc. of Law, p. 247, and authorities there cited; Cooley, Const. Lim. (4th ed.), pp. 243, 244, and note.

It is not shown in the statement of facts how the city of Graham is incorporated, but we take it for granted that it is incorporated under the general act of the legislature on the subject, and it only has such authority as is conferred on it by the provisions of such general act. Article 419, Revised Civil Statutes, 1895, gives the municipal authorities exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon. A number of articles also confer authority on the city council to do certain things. But we fail to find any authority expressly authorizing the city council to pass a

"curfew ordinance," as it is termed, or an ordinance making it a misdemeanor for a person under twenty-one years of age to be found on the streets or public highways of any city or town after nine o'clock at night. So that the authority to pass this ordinance must be under the general powers of the city to preserve the peace, and to protect the good order and morals of the city. Article 457 would seem to prescribe the authority of the council in this respect. It is as follows: "The city council shall by ordinance have authority to prevent all trespasses; breaches of the peace and good order; assaults and batteries, fighting and quarreling; using abusive, obscene, profane, and insulting language; misdemeanors, and all disorderly conduct, and punish all persons thus offending." If this is the express authority on the subject, it would appear to exclude the authority of the council to go beyond it. But we will treat the question in the proposition as to whether or not, conceding that the municipality has authority under its general powers to pass any ordinance that is reasonable to preserve the public peace and to protect the good order and morals of the community, the ordinance in question is reasonable. We hold that it is not; that it is paternalistic, and is an invasion of the personal liberty of the citizen. It may be that there are some bad boys in our cities and towns whose parents do not properly control them at home, and who prowl about the streets and alleys during the night time and commit offenses. Of course, whenever they do, they are amenable to the law. But does it therefore follow that it is a legitimate function of government to restrain them and keep them off the streets when they are committing no offense, and when they may be on not only legitimate errands, but engaged in some necessary business. At common law a conspiracy was an indictable offense, and under our statute a conspiracy to do certain things is an offense. If persons go upon the street, whether under or over age, in pursuance of a conspiracy to commit burglary or some other offense, they are indictable. But it is not claimed here that the going upon the streets by appellant was in pursuance of any conspiracy to commit any offense. We understand it to be made unlawful for any person under twenty-one years of age to go upon the streets after nine o'clock at night, or, more strictly speaking, later than fifteen minutes after the ringing of what is called

the "curfew bell" provided for by the ordinance. True, some exceptions are made. For instance, a person under twenty-one years of age may go upon the streets with his parent or guardian, and such person can go upon the streets in search of the services of a physician, but these are the only exceptions. We can well imagine a number of other exceptions. Indeed, so numerous do they occur to us that they serve themselves to bring into question the reasonability of the law. A minor may be unavoidably detained away from home after night, yet in passing along the streets on his way to his home he commits an offense. He may be at church or at some social gathering in the town, and yet when the curfew bell tolls in the midst of the sermon or exhortation, he would be compelled to leave and hie himself to his home, or, if at a social gathering, he must make his exit in haste. He could not be sent by his parents to a drug store, or, for that matter, on any errand, save and except for a physician. The rule laid down here is as rigid as under military law, and makes the tolling of the curfew bell equivalent to the drum taps of the camp. In our opinion, it is an undue invasion of the personal liberty of the citizen, as the boy or girl (for it equally applies to both) have the same rights of ingress and egress that citizens of mature years enjoy. We regard this character of legislation as an attempt to usurp the parental functions, and as unreasonable, and we therefore hold the ordinance in question as illegal and void. See *City of St. Louis v. Fitz*, 53 Mo. 582; *City of Chicago v. Trotter* (Ill. Sup.), 26 N. E. Rep. 359. The relator is ordered discharged.

Relator ordered discharged.

TAYLOR v. REESE, Judge.

PERRY v. REESE, Judge.

108 Ga. 379—33 S. E. Rep. 917.

Decided March 17, 1899.

PRACTICE: BILL OF EXCEPTIONS: *May be presented and signed before motion for new trial—Mandamus.*

1. If, upon the trial of a criminal case in a court whose judgments are directly reviewable by the Supreme Court, an error of law be committed, the necessary effect of which is to control the verdict,

and thus deprive the accused of a fair and lawful trial, he may, without moving for a new trial, sue out a bill of exceptions, for the purpose of having such error corrected.

2. When the refusal of a judge to certify a bill of exceptions tendered to him in a criminal case, in which no motion for a new trial had been made, is based solely upon the ground that, in his opinion, he had, in the absence of such a motion, no authority to certify the bill of exceptions, this court, without inquiring into the merits of the question presented by the bill of exceptions, will, by *mandamus* absolute, command the judge to certify the same. The decisions of this court in *Pitts v. Hall*, 60 Ga. 389, and *Dotterer v. Harden*, 88 Ga. 145, 13 S. E. 971, in so far as they held to the contrary, are, upon a review thereof, overruled.

(Syllabus by the Court.)

Original application by Will Taylor and Fred Perry for writ of *mandamus* against Hon. Seaborn Reese, Judge. Writs granted.

Horace M. Holden and *Alexander W. Stephens*, for the movants.

LUMPKIN, P. J. Upon an indictment charging Will Taylor and Fred Perry with the murder of Jep Dennard, they were jointly tried and convicted. Without moving for a new trial, each by his counsel sued out a separate bill of exceptions, alleging, among other things, that the judge erred in refusing to give in charge to the jury certain written requests, the object of which was to have the jury instructed upon the law of voluntary and involuntary manslaughter. Each of these bills of exceptions set forth a statement of the evidence introduced at the trial, recited that the judge ruled that it was not proper to charge the jury as requested, and complained that the verdict of guilty was necessarily controlled by this ruling. Each bill of exceptions also alleged that the judge failed entirely to charge concerning the lower grades of homicide. Perry's bill of exceptions contained one assignment of error which was not in that of Taylor, but it is not now essential to state or discuss the same. The judge declined to certify either of the bills of exceptions, basing his refusal upon the ground that, in the absence of a motion for a new trial, he had no authority so to do. Thereupon each of the accused sued out an application for *mandamus*, to compel the judge to certify his bill of exceptions.

We have reached the conclusion that it was the duty of the

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Will Taylor d, they were a new trial, ptions, alleg- using to give the object of law of volun- e bills of ex- oduced at the ot proper to t the verdict g. Each bill rely to charge 's bill of ex- as not in that r discuss the e bills of ex- n the absence to do. There- r mandamus, . e duty of the

judge to certify these bills of exceptions, notwithstanding there was in neither case a motion for a new trial. The requests to charge were manifestly predicated upon the theory that, under the evidence and the statements made by the accused at the trial, the law of both grades of manslaughter was involved. An examination of these bills of exceptions makes it perfectly clear that in suing them out the accused were seeking to avail themselves of the provisions of the act of December 20, 1898, "to dispense with a motion for new trial and filing brief of the evidence, and to authorize a direct bill of exceptions, in certain cases," which declares: "That from and after the passage of this act, in any case now or hereafter brought where the judgment, decree or verdict has necessarily been controlled by one or more rulings, orders, decisions or charges of the court, and the losing party desires to except to such judgment, decree or verdict, and to assign error on the ruling, order, decision or charge of the court, it shall not be necessary to make a motion for a new trial, nor file a brief of the evidence, but the party complaining shall be permitted to present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision or charge complained of." Acts of 1898, p. 92. This act renders unnecessary the filing of a motion for a new trial when the case depends upon a controlling question of law, and the complaint is that the trial judge committed a vital error with respect to the same. The losing party in any case might very properly concede that, under the evidence and a given charge, the verdict against him, assuming the charge to be correct, was demanded; yet, at the same time, he might with abundant reason insist that, because of error in the charge, the jury were constrained to find as they did. The correction by this court of such an error results in a new trial. The act of 1898 simply gives in explicit terms a right of which parties litigant frequently availed themselves before its passage. See, in this connection, *Roberts v. Neal*, 62 Ga. 163; *Trippe v. Wynne*, 76 Ga. 200; *Massengill v. First Nat. Bank*, Ibid. 341, 347; *Haskins v. Bank of State of Ga.*, 100 Ga. 216; *Franklin v. Adams*, 101 Ga. 126, 28 S. E. Rep. 611. We do not, of course, wish to be understood as saying that a party can except to or complain

of a verdict as being contrary to evidence without first moving for a new trial. *Jones v. Pitts*, 98 Ga. 521, 25 S. E. Rep. 573; *Holsey v. Porter*, 105 Ga. 837, 31 S. E. Rep. 734.

There is enough in each of the bills of exceptions tendered to the judge to enable this court to clearly understand and pass upon the rulings complained of; and if the positions taken by counsel for the accused are well founded, it was the right of the accused to have the jury determine the question whether or not they were guilty of a lower grade of homicide than murder. If the judge committed the errors alleged, they were deprived of this substantial right, and the verdicts actually rendered were necessarily so far controlled by the judge's action as to necessitate a new trial.

We do not, however, feel called upon, in dealing with these applications for *mandamus*, to pass upon the merits of the question presented by the bills of exceptions. It is true that in the case of *Pitts v. Hall*, 60 Ga. 389, this court held that a "trial judge should not be by *mandamus* compelled to sign a bill of exceptions which was without merit." And to the same effect see *Dotterer v. Harden*, 88 Ga. 145, 13 S. E. Rep. 974, in which it was held that: "The Supreme Court will not grant a *mandamus nisi*, to the end that a bill of exceptions may be signed and certified, where it affirmatively appears on the face of the application that the decision complained of and sought to be excepted to was correct, inasmuch as in such case the *mandamus* would be of no practical benefit to the applicant." Following these rulings would require in every case like the present ones an examination by this court into the merits of the questions presented by the bill of exceptions tendered, and an *ex parte* decision thereon of the main case. The ruling in the case last cited was based mainly on that in 60 Ga., the correctness of which was conceded, and therefore not brought under review. So far as relates to the question with which we are now dealing, neither of those decisions can, in our opinion, be regarded as sound. We have accordingly permitted counsel to review the same, and, to the extent indicated in the second headnote, they are overruled. The law makes it the imperative duty of a judge, whenever a true bill of exceptions is tendered to him, to certify it. Upon his refusal to sign, and certify a bill of exceptions, it is the right of

the party tendering the same to apply to this court for a *mandamus nisi*, calling upon the judge to state the reasons for his failure or refusal to certify. It then becomes the duty of this court to consider and determine the validity of these reasons, and, if they be insufficient, the law explicitly declares that this court "shall issue a *mandamus* absolute commanding the judge to sign and certify the bill of exceptions." See Civil Code, § 5546.

We have already shown that the reason given by Judge Reese for declining to certify the present bills of exceptions was insufficient. He could not, with propriety, have assigned as a reason for declining to certify that the bills of exceptions did not, in his opinion, show the commission of any error. If this were allowable, every judge could pursue a like course with reference to any bill of exceptions tendered to him, and the inevitable results of a practice of this kind would obviously be such as the law never contemplated. In point of fact, as has been seen, Judge Reese did not, in his answer to the *mandamus nisi*, allege such a reason for not certifying, and we are fully satisfied that no argument based upon the proposition that the rulings excepted to were correct should have any weight in determining whether or not the writs of *mandamus* should be made absolute. Conceding that it may finally be held that the rulings complained of were free from error, it is still the right of the applicants to have their cases brought to, heard in, and determined by this court in the regular and lawful way. It therefore becomes our duty to order in each case a writ of *mandamus* absolute. In view of what has just been said, we could not do so if the prior decisions of this court cited above were adhered to, without first inquiring into the merits of the questions presented by these bills of exceptions, and reaching a conclusion that reversible error had been committed. In other words, we would have to decide the cases against the State without hearing from her counsel, and then, merely as matter of form, reverse the judgments when the cases subsequently reached here upon certified bills of exceptions. Such a practice would not only be anomalous, but, as a result thereof, it would frequently happen that cases of the utmost importance would, for all practical purposes, be finally determined before they reached this court in

the manner prescribed by law, and that, too, without even notice to parties vitally interested. *Mandamus* absolute ordered in each case. All concurring.

NOTES (by J. F. G.).—In *Stewart v. Huntington Bank*, 11 S. & R. 267, on page 270, appears the following: "The counsel who takes an exception has a right to have it fixed immediately; but this may be done without drawing up the bill in full form,—a note in writing is sufficient; and such a note should never be omitted."

In *Lyon v. Evans*, 1 Ark. 349, on page 360, appears the following: "The object of bills of exception is to preserve the evidence of facts, which, in the ordinary course of proceedings in the court, would not otherwise appear of record in the case. The bill of exceptions must be tendered at the trial; for, if the party acquiesced, he waives it, and shall not resort back to his exception after a verdict against him, when, perhaps, if he had stood on his exceptions, the other party had more evidence, and need not have put the cause on that point; not that it need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting; because it is to become a record."

Where a case is being disposed at one hearing, there is no need of preserving separate bills of exception; for, by keeping note of the points, they can more conveniently be placed in one general bill of exceptions; but where various matter are passed upon at different terms of court, the better practice is to preserve the matters in separate bill of exceptions, having each bill signed by the judge before his memory as to such matters becomes uncertain. Where a motion for continuance is made and overruled, it is consistent with good practice to have a bill of exceptions incorporating the motion immediately signed; and when convenient so to do, the attorney should have such bill of exceptions prepared in advance, that it may be presented for signature at the time of the ruling upon the motion. It being claimed by one or more courts that a bill of exceptions should be signed in open court, prudence should prompt the attorney to present it in open court, when such can be done; and in the certificate to the bill of exceptions have it stated that the same is presented, signed, and sealed in open court; and also have the clerk note such fact as a matter of record.

STATE V. McEWEN.

151 Ind. 485—51 N. E. Rep. 1053.

Decided November 29, 1898.

PRACTICE ON APPEAL: Instructions—Evidence—Variance.

1. While it is not good practice, on appeals by the State, to set out the evidence *in extenso*, still there should be enough evidence to show whether instructions sought to be reviewed were applicable

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to the evidence. Without some foundation of fact in the record, this court will not enter into an abstract discussion of points.

2. Where the indictment avers that certain moneys stolen were the property of J. A. P. and *Frank A. P.*, and the evidence was that such moneys belonged to J. A. P. and *Franklin A. P.*, there would be a fatal variance, unless the evidence also showed that "*Franklin A.*" was the same person described in the indictment as "*Frank A.*," and was commonly known by that name.

Appeal from the Johnson County Circuit Court, by the State, to test the correctness of the action of the trial court in giving and refusing certain instructions.

W. A. Ketcham, Atty. Gen., *Alonzo Blair*, *W. E. Deupree* and *M. L. Herbert*, for the State.

Miller & Barnett and *William A. Johnson*, for appellee.

MCCABE, J. The appellee was prosecuted for the crime of larceny in the Johnson circuit court, and was acquitted. The State appeals, and assigns as error the refusal to give the following instruction: "I instruct you, gentlemen of the jury, that if the indictment in this cause shows and alleges that the property stolen or alleged to have been stolen was owned at said time by Jackson A. Pruitt and Frank A. Pruitt, and the evidence shows that the property stolen was the property of Jackson A. Pruitt and Franklin A. Pruitt, and that said Franklin A. Pruitt is, and for years has been, known and been doing business in the name of and called himself Frank A. Pruitt, then I instruct you that there would be no variance between the evidence and the allegation of the indictment that would entitle the defendant to an acquittal under the law; but the jury are the exclusive judges of both the law and the evidence." The evidence is not in the record, nor is there any statement in the bill of exceptions or in the record showing that this instruction was relevant to the evidence, and hence no question of law is presented for decision. Without some statement of the evidence, we must presume that the instruction was refused because there was no evidence to which it was applicable. While it is true that it is neither necessary nor proper, in appeals by the State, to set forth the evidence in full, it is also true that there must be some statement in the bill of exceptions showing that there was evidence to which the instructions were relevant.

It is a well-established principle in appellate procedure that the court will not decide mere abstract questions, and, where there are no facts stated, nothing but abstract questions can, in such a case as this, arise upon a ruling refusing instructions. *State v. Kern*, 127 Ind. 465, 26 N. E. Rep. 1076.

The giving of an instruction is assigned by the State as error, reading as follows: "The names of the persons who are alleged to be the owners of the money alleged to have been stolen are material allegations of the indictment, and must be proven as charged; so, if you find from the evidence that the name of one of the owners of the money alleged to have been stolen was Franklin A. Pruitt, then you must find the defendant not guilty." The alleged names of the owners of the money alleged to have been stolen were Jackson A. Pruitt and Frank A. Pruitt. If the evidence showed that the name by which Franklin A. Pruitt was commonly known was Frank A. Pruitt, even though Franklin A. Pruitt was his correct name, the instruction was erroneous, because the name by which a person is commonly known may be employed in an indictment, and it will be good if the proof shows that he is commonly known by that name. Bishop's New Criminal Proc., § 686; Wharton's Criminal Evidence, § 95; *Ehlert v. State*, 93 Ind. 76; *Henry v. State*, 113 Ind. 304, 307, 15 N. E. Rep. 593; *Walter v. State*, 105 Ind. 589, 5 N. E. Rep. 735; *Kruger v. State*, 135 Ind. 573, 35 N. E. Rep. 1049; *Hix v. People*, 157 Ill. 382, 41 N. E. Rep. 862. But, the evidence not being in the record, and no statement therein as to what the evidence showed, we cannot, as the attorney for the State seems to suppose, presume that the evidence showed that Franklin A. Pruitt was commonly known by the name of Frank A. Pruitt. In the absence of such evidence or statement in the record, proof that the name of one of the owners of the stolen money was Franklin A. Pruitt instead of Frank A. Pruitt would be a fatal variance. See the authorities last above cited. Therefore we cannot say that the court erred in giving the instruction. The appeal is not sustained.

BROWNING v. STATE.

54 Neb. 203—74 N. W. Rep. 631.

Decided March 17, 1898.

PRACTICE: *Necessity for arraignment and plea.*

1. A judgment of conviction of felony cannot stand where there was no arraignment of, and plea by, the accused before the trial.
2. *Allyn v. State*, 21 Neb. 593, distinguished.
3. When it is discovered during the trial on the charge of a felony that there has been no arraignment and plea, the court should not proceed with the trial without arraigning the accused, entering his plea, and causing the jury to be resworn and the witnesses to be re-examined.

(Syllabus by the Court.)

Error to the District Court of Gage County; Stull, Judge.
Reversed.

L. W. Colby, for the plaintiff in error.

C. J. Smyth, Attorney-General, and *Ed. P. Smith*, Deputy Attorney-General, for the State.

NORVAL, J. This was a prosecution by information filed in the court below, by the county attorney, charging the prisoner with the crime of burglary. Upon the trial the accused was found guilty, a motion for a new trial, and also a motion in arrest of judgment, were filed and overruled, and he was sentenced by the court to imprisonment in the penitentiary for a term of years. A reversal is asked because the defendant was not arraigned, and no plea was entered to the information by him, or in his behalf, prior to the commencement of the trial. This court held, in *Barker v. State*, 54 Neb. 53, that it was indispensable to the validity of a conviction of a felony that the record affirmatively show the accused, before trial, was arraigned, and that he pleaded to the information or indictment, or, in case he stands mute or refuses to plead, that the court entered the plea of not guilty for him. A re-examination of the question satisfies us that the conclusion then reached is sound and should be adhered to. In addition to the authorities mentioned in the opinion in that case the doctrine announced is sustained by the following: *State v. Hughes*, 1 Ala. 655; *Childs v. State*, 97

Ala. 49; *Bowen v. State*, 98 Ala. 83; *People v. Corbett*, 28 Cal. 328; *McJunkins v. State*, 10 Ind. 140; *Rocky v. State*, 19 Ind. 225; *Tindall v. State*, 71 Ind. 314; *Bowen v. State*, 108 Ind. 411; *Miller v. People*, 47 Ill. App. 472; *Gould v. People*, 89 Ill. 216; *Parkinson v. People*, 135 Ill. 401; *State v. Epps*, 27 La. Ann. 227; *State v. Ford*, 30 La. Ann. 311; *State v. Christian*, 30 La. Ann. 367; *State v. Revells*, 31 La. Ann. 387; *State v. Hunter*, 43 La. Ann. 156; *Wilson v. State*, 42 Miss. 639; *State v. Hubbell*, 55 Mo. App. 262; *State v. Saunders*, 53 Mo. 234; *State v. Barnes*, 59 Mo. 154; *State v. Montgomery*, 63 Mo. 296; *State v. Agee*, 68 Mo. 264; *State v. Vanhook*, 88 Mo. 105; *Early v. State*, 1 Tex. App. 248; *McFarland v. State*, 18 Tex. App. 313; *Roe v. State*, 19 Tex. App. 89; *Jefferson v. State*, 24 Tex. App. 535; *Munson v. State*, 11 S. W. Rep. (Tex.) 114; *Sperry v. Commonwealth*, 9 Leigh (Va.), 261; *Elick v. Washington Territory*, 1 Wash. Ter. 136; *Douglass v. State*, 3 Wis. 820; *Crain v. United States*, 162 U. S. 625. There are a few decisions which hold that an arraignment and plea may be waived by the prisoner in all except capital cases, but such decisions, for the most part, were rendered under statutes different from ours. Some courts have decided, among others our own, the mere placing the defendant on trial without arraignment or a plea to the indictment will not work a reversal of a conviction for a misdemeanor. *Allyn v. State*, 21 Neb. 593. Whether that decision is right or wrong we are not called upon to decide, since the scope of the opinion is limited to trials for misdemeanors. It has no application to prosecutions and convictions for felonies.

This record shows that, after the jury had been impaneled and sworn and the testimony of two witnesses on behalf of the State had been taken, the defendant, over his objection and exception, was arraigned, and refusing to plead, the court entered for him a plea of not guilty. It is argued that this cured the error committed by the failure to have the defendant arraigned and plead before entering upon the trial. We do not think so. The statutes of this State contemplate that these steps shall precede the trial. The object of requiring an arraignment and plea in a criminal case is to inform the accused of the nature of the charge against him, and to make up an issue for trial. Until

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a plea of not guilty is entered, there is no issue of fact for the jury to determine. If the arraignment and plea may take place during the progress of the trial, with the same propriety the defendant can be arraigned, and his plea entered after verdict and at the time the court passes sentence. There can be no valid trial for a felony without an arraignment and plea before the trial is entered upon.

In Clark's Criminal Procedure, section 128, it is said: "Not only is the arraignment necessary, but the plea is equally so, for without a plea there can be no issue to try. And the fact of arraignment and plea must appear on the record. By weight of authority, the arraignment and plea must precede the impaneling and swearing of the jury. An omission thereof cannot be cured by an arraignment and plea after the trial has commenced." Numerous authorities are cited in the note which sustain the text.

In 1 Bishop, Criminal Procedure, section 733, the rule is stated thus: "Without plea there can be no valid trial. It is so even though the defendant went voluntarily and without objection to trial, knowing there was no plea. It must be before the jury are sworn; afterward the plea is too late."

Collier, C. J., in *State v. Hughes*, 1 Ala. 657, observed: "The idea of selecting and swearing a jury to try a case which, in its progressive steps, has not reached the stage when it is triable, is a perfect anomaly. The oath administered to the jury related to the present time, and cannot authorize them to try a case which is afterwards placed in a condition for trial; until the prisoner was called upon for his plea, it could not be known whether there would be an issue of fact for the jury, or what the issue, if any, might be. The prisoner, instead of submitting the question of his guilt, might have pleaded in abatement, or have presented to the court legal objections to the indictment."

In *Parkinson v. People*, 135 Ill. 401, the defendant was convicted of rape. The jury was impaneled and sworn, and one witness was partly examined, when it was discovered that there was no arraignment or plea. The defendant was thereupon arraigned, a plea of not guilty was interposed, and the trial proceeded without reswearing the jury. It was held the verdict and judgment were erroneous, because the arraignment and plea

did not precede the selection and swearing of the jury, and that the arraignment made and plea entered during the trial did not purge the record of the error.

Crain v. United States, 162 U. S. 625, was a conviction for forgery, and a reversal was sought on the ground that there had been no formal arraignment and plea before the beginning of the trial. The record showed the appearance of the prosecuting attorney; the appearance of the accused in person by his counsel; an order by the court that a jury come "to try the issue joined;" the selection of the jury which were "sworn to try the issue joined and a true verdict render;" the trial, verdict of guilty and judgment entered thereon. The conviction was reversed, because it did not affirmatively appear that the defendant was formally arraigned or that he pleaded to the indictment before trial. Mr. Justice Harlan delivered the opinion of the court, and, after reviewing the authorities on the question, said: "Without citing other authorities we think it may be stated to be the prevailing rule, in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced; and that unless this fact appears affirmatively from the record the judgment cannot be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury were sworn to 'try the issue joined.' The record should be a permanent memorial of what was the issue tried, and show whether the judgment whereby it was proposed to take the life of the accused or to deprive him of his liberty was in accordance with the law of the land. . . . Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea? . . . We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently, such a defect in the record of a criminal trial is not cured by section 1025 of

the Revised Statutes, but involves the substantial rights of the accused. It is true that the constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous."

In *State v. Montgomery*, 63 Mo. 296, it was decided that the failure to arraign a prisoner and enter his plea before the jury is sworn is reversible error, and that the entry of a plea afterwards is too late. See *Early v. State*, 1 Tex. App. 248; *State v. Hunter*, 43 La. Ann. 157; *People v. Corbett*, 28 Cal. 328; *Douglass v. State*, 3 Wis. 820; *Territory v. Brash*, 32 Pac. Rep. (Ariz.) 260; *State v. Baker*, 57 Kan. 541.

The attorney-general has cited cases which are in conflict with the above, but we decline to follow them. After the accused was arraigned the jury should have been resworn and the witnesses already examined should have been re-examined. Had this been done, the omission of the arraignment and plea before the selection of the jury would not have been available. *Weaver v. State*, 83 Ind. 289; *State v. Weber*, 22 Mo. 321; *Disney v. Commonwealth*, 5 S. W. Rep. (Ky.) 360. For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTES (by J. F. G.).—In the case of *Barker v. State*, referred to in the above opinion, the cases cited, to the effect that a judgment without a plea should be reversed, are as follows: *Burley v. State*, 1 Neb. 385; *State v. Williams*, 117 Mo. 379; *Johnson v. People*, 22 Ill. 318; *Aylesworth v. People*, 65 Ill. 301; *Hoskins v. People*, 84 Ill. 87; *Davis v. State*, 38 Wis. 487; *State v. Wilson*, 42 Kan. 587; *Ray v. People*, 6 Colo. 231; *People v. Moody*, 69 Cal. 184; *Grigg v. People*, 31 Mich. 471.

The doctrine applies to misdemeanors as well as to felonies.—In *Johnson v. People*, 22 Ill. 314, the indictment was for conspiracy. The following paragraph is an excerpt from the opinion in that case:

"The 181st section of the Criminal Code (Scates' Comp. 407) provides that, upon the arraignment of a prisoner, it shall be sufficient,

without any other form, for him or her to declare orally, by himself or herself, or his or her counsel, that he or she is not guilty; which plea the clerk is required to immediately enter on the minutes of the court, and the mention of the arraignment and such plea shall constitute the issue between the People and the prisoner, and if the clerk should neglect to insert in the minutes of the court the arraignment and plea, it provides that it shall be done under the order of the court, and then the error or defect shall be cured. The arraignment and plea has always, by the practice in cases of felonies, been regarded as essential to the formation of the issue to be tried by the jury, but in cases of misdemeanor the practice allows the plea of not guilty to be entered without arraignment and may be entered by counsel. But it is believed that the practice is uniform, both in England and this country, in requiring the formation of an issue to sustain a verdict. Without it there is nothing to be tried by the jury. If the record had shown that the trial was by consent, in the case of a misdemeanor, it might be held to cure the defect, but when the trial does not appear to have been so had, no such intendment can be indulged. Or, in case there had been a plea entered, and the clerk, by an omission of his duty, had failed to enter it upon the record, the prosecuting attorney might have cured the defect by procuring such an entry under the order of the court. But the statute has provided no other mode of obviating the objection, and, unless waived by the defendant, it must be held to be error. In this case the error has not been cured by either of these modes, and the judgment should have been arrested for the want of such plea."

In *Aylesworth v. People*, 65 Ill. 301, a conviction for selling liquor without a license was reversed, Mr. Justice McAllister saying: "The record should also show that the plea of not guilty was entered. Without it there is nothing for the jury to try."

The old English practice.—Under the old English law, if a prisoner stood mute and failed to plead to the indictment a jury was impaneled to determine whether his conduct came from contumacy or from a natural impediment. According to Blackstone (book 4, p. 325), if the prisoner was found to be obstinately mute, and the indictment was for high treason, it was settled that his silence was equivalent to a conviction, and that judgment and execution should follow, which that author claimed applied to the lowest species of felony (petit larceny) and misdemeanors; but the same author says that upon appeals or indictments for other felonies, or petit treason, according to the ancient law the prisoner was not deemed convicted, but, because of his obstinacy, should receive "the terrible sentence of *penance*, or *peine*." A respite for a few hours was permitted the prisoner, the sentence being distinctly read to him, "that he might know his danger; and, after all, if he continued obstinate, his offense was clergyable; he had the benefit of clergy allowed him, even though too stubborn to pray it." Blackstone says that the punishment "was purposely ordained to be exquisitely severe, that by that means it might rarely be put in execution." He describes the punishment as follows (p. 327):

"That the prisoner be remanded to the prison from whence he came,

and put in a low, dark chamber, and there be laid on his back, on the bare floor, naked, unless decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he should have no sustenance, save only, on the first day, three morsels of the worst bread, and, on the second day, three draughts of standing water that should be nearest the prison door; and in this situation this should be alternately his daily diet *till he died*, or (as anciently the judgment ran) *till he answered*."

Thorley's Case (Kelyng, 27).—Kelyng in reporting the proceedings at the Newgate Sessions in the fourteenth year of Charles II. gives the following report (the spelling, capitals, and italics are as they appear in the report):

One stand Mute, Thumbs tyed together with Whipcord.

At the same Sessions, *George Thorley*, being indicted for Robbery, refused to plead, and his two Thumbs were tyed together with Whipcord, that the Pain of that might compel him to plead, and he was sent away so tyed, and a Minister perswaded to go to him to perswade him; And an Hour after he was brought again and pleaded. And this was said to be the constant Practice at Newgate.

A New England victim.—It is said that during the prosecutions in New England, for that fictitious crime of witch-craft, a respectable citizen being so accused, well knowing that by reason of the excitement and religious fervor of the times, a plea of not guilty and trial would result in a conviction, with confiscation of property; and that the same judgment would follow a plea of guilty, he refused to plead, thereby preventing a conviction, and enabling his family to retain the property. The court ordered that he be pressed, because of his obstinacy. During this process, the dying victim's tongue protruded, which so shocked the sensibilities of the devout sheriff, that he pushed it back with his cane.

STATE V. REED.

76 Miss. 211—71 Am. St. Rep. 528, 43 L. R. A. 134, 24 So. Rep. 308.

Decided December 19, 1898.

RAILROADS: *Rights of hackmen.*

A railroad company cannot confer on certain hackmen the exclusive right to enter its station grounds and solicit patronage from incoming passengers to the exclusion of others.

Appeal from the Circuit Court of Warren County; Hon. W. K. McLaurin, Judge.

Joseph Reed was prosecuted under section 1320 of the Code of 1892 for going upon the inclosed lands of another without

the owner's consent, and after being notified not to do so. He was fined by a justice of the peace, but upon appeal the circuit court found for the defendant; and the State appeals. Affirmed.

McWillie & Thompson, for the Alabama & Vicksburg Railway Company.

R. L. McLaurin, for the appellee.

Woods, C. J., delivered the opinion of the court.

Joseph Reed, the appellee, was arrested upon affidavit charging him with trespassing upon private premises belonging to the Alabama & Vicksburg Railway Company, and was, before the justice of the peace, tried and convicted. He appealed from that conviction to the circuit court of Warren county, and was there tried upon an agreed statement of facts, and was, by the judgment of that court, acquitted of the charge and discharged. From this judgment of the circuit court the State prosecutes this appeal.

From the agreed statement of facts it appears that the depot of the railway company in the city of Vicksburg is surrounded by a fence, and that there is a "considerable inclosure of grounds adjacent thereto." It further appears, also, that "within said inclosure around the depot is the most convenient and best place for hackmen and busmen to discharge, solicit and receive passengers departing and arriving on the passenger trains of said company, and that any hackman or busman who had the exclusive privilege of entering this inclosure and soliciting passengers there, would have an advantage over hackmen or busmen excluded therefrom, so far as passengers arriving on said trains was concerned."

These facts, moreover, appear in the agreed statement, viz.: that the railway company granted, in June, 1894, the exclusive privilege of entering said inclosure and soliciting passengers therein to said Peine, and that Peine was a person engaged in the hack, bus and general transfer business in Vicksburg, and that, after said exclusive grant to Peine, all other hackmen and busmen were excluded from entering said inclosure for the purpose of soliciting passengers therein, and were notified not to enter said inclosure for that purpose, under threat of being prosecuted as trespassers; that the appellee, Reed, after having

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been notified not to enter said inclosure for such purpose, drove his hack into the inclosure, and while therein solicited and received a passenger, and then drove away, and that in doing this he created no disturbance or disorder; that Cherry street is about one hundred and fifty feet from the depot, and that from the depot to Cherry street, where hacks, other than Peine's, can stand, there is a good sidewalk. In a word, Peine's hacks have the exclusive privilege of entering the inclosure surrounding the depot and soliciting incoming passengers, while all other hacks are excluded from the inclosure and must stand outside and about one hundred and fifty feet from the depot, and in an open street.

It is admitted in the agreed statement any hackman, or busman, having the exclusive privilege of entering said inclosure and soliciting passengers there, would, to that extent, have an advantage over hackmen or busmen excluded therefrom, so far as concerned incoming passengers.

The agreed statement of facts distinctly states the question to be decided by us, and to that we must confine ourselves. Says the agreed statement: "It is contended that the said company had the right to make the said contract, and thus exclude the defendant and others than the said Peine from the said inclosure, and to grant to the said Peine the exclusive right to enter the said inclosure for the purpose of there soliciting passengers for his hack line. Defendant controverts this position, in so far as it is claimed that the said company can grant the exclusive right to any particular person to enter the said inclosure with his hack and there solicit passengers, and contends that the railway company must exclude all, or admit all into the said inclosure, so long as they conduct themselves in an orderly and peaceable manner."

The single issue is thus sharply defined, viz: Has a railway the right to confer upon one hackman the exclusive privilege of entering with his hacks its inclosed station-house grounds, and of soliciting incoming passengers, and to exclude all others from the inclosure, such privilege conferring advantages upon the favored hackman and discriminating against all other hackmen by forbidding them to enter the inclosure to solicit passengers, and by placing the hacks of those excluded one hundred and

fifty feet from the depot, and in an open street? The question has never before been presented in our reports, but it is by no means a new one, and has been passed upon in other jurisdictions.

Quite independently of constitutional or statutory provisions, it seems to be the prevailing doctrine in the United States that a railroad company may make any necessary and reasonable rules for the government of persons using its depots and grounds; yet it cannot arbitrarily, for its own pleasure or profit, admit to its platforms, or depot grounds, one carrier of passengers or merchandise, and, at the same time, exclude all others.

The question is one that affects not only the excluded hackman: it affects the interest of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in case of exclusion of drays and wagons from its grounds other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed in the present case would be, in effect, to confer upon the railway company the control of the transportation of passengers beyond its own lines, and, in the end, to create a monopoly of such business, not granted by its charter, and against the interests of the public. These are the views ably urged in *Kalamazoo Hack Co. v. Sootsma*, 84 Mich. 194; *Montana Union Ry. Co. v. Manglois*, 9 Mont. 419; *Cravens et al. v. Rodgers*, 101 Mo. 247, and *McConnell v. Pedigo*, 92 Ky. 465. These are the views held, too, by the three dissenting judges in the case of *Old Colony R. Co. v. Tripp*, 147 Mass. 35-41. The majority of the judges in that case held that a railroad might grant to one an exclusive right to solicit the patronage of incoming passengers, but this is the only American case making that distinct holding, and that opinion was delivered by four judges, the other three members of the court vigorously dissenting, and with better show of reasoning, in our judgment. The case of *Barney v. Oyster Bay & Huntington Steamboat Co.*, 67 N. Y. 31; *Fluker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, and

Cole v. Rowen, 88 Mich. 219, do not present the precise point involved in the case before us. They are all decisions of other questions and can be readily distinguished from the case in hand.

Counsel for appellant thinks that in *Cole v. Rowen*, 88 Mich. 219, the Supreme Court of Michigan has swung away from the doctrine announced in the earlier case of *Kalamazoo Hack Co. v. Sootsma*, 84 Mich. 194. But that very able court did not so think, and was careful to disabuse the mind of counsel, who seems to have the notion which counsel here puts forward, and the court clearly distinguished the two cases.

We are of opinion that the railway had no right to exclude Reed, the appellee, from its depot and inclosed grounds, on the facts appearing in the agreed statement on which the case is submitted to us, and hence that the action of the court below in discharging Joseph Reed was correct.

Affirmed.

STATE v. SNOVER.

63 N. J. Law, 382—43 Atl. Rep. 1059.

Decided June 12, 1899.

RAPE: "Social honesty"—Baptismal certificates not evidence.

1. Upon the trial of an indictment for having carnal intercourse with a woman under the age of consent, the defendant offered to prove "his reputation for morality, virtue, and honesty in living," which was overruled as being immaterial. *Held* to be error.
2. "Honesty," in the above context, means chastity or sexual propriety.
3. The age of the prosecuting witness being in issue, it was error to admit a baptismal certificate in which the age of birth was certified.

(Syllabus by the Court.)

Error to the Warren Quarter Sessions. Before MAGIE, Chief Justice, and Justices GARRISON, LIPPINCOTT and COLLINS.

George A. Angle, prosecutor for the State.

William H. Morrow, for the defendant.

GARRISON, J. Upon the trial of an indictment for having carnal knowledge of a woman under the age of consent, the defendant offered to prove his reputation by the following question put to a witness who lived in his neighborhood: "Do you know what is his [defendant's] reputation for morality, virtue, and honesty in living?" To this question the prosecutor objected, stating as his sole ground that "it makes no difference." The objection thus made was sustained, and a bill of exceptions sealed, upon which error is now assigned.

Evidence of the defendant's general reputation was, of course, admissible. *Baker v. State*, 24 Vroom, 45, 20 Atl. Rep. 858.

If his general reputation were admissible upon a specific indictment, his specific reputation with respect thereto was relevant. *Dally v. Overseers of Woodbridge*, 1 Zab. 491; *Hawkins v. State*, id. 630. But his specific reputation in other respects was irrelevant.

The contention of the State was that the question put to the defendant's witness went outside of the issue, in that it called for his reputation for "honesty in living," which, it was argued, referred only to financial probity, hence was not germane to an issue that turned upon sexual laxity.

This distinction, which is not suggested by the objection, is not well founded in fact. The word "honesty," from the Latin "*honestus*," is essentially a word that takes its meaning from its context. Primarily it means "suitable," "becoming," or "decent,"—meanings that obviously lend themselves to divers contexts. In moneyed transactions it means financial integrity; in affairs of State it means loyalty; in matters of friendship it means steadfastness; and so on. In sexual relations it imports chastity. This is an accepted signification.

In Webster's International Dictionary it is said to mean "chastity, modesty."

As early as 1385 Chaucer so used it, saying:

"Why lyked me thy yellow heer to see,
More than the bounds of myn honestie?"

In 1621, Burton, in the "Anatomy of Melancholy," wrote: "It was commonly practiced in Diana's Temple for women to go barefoot over hot coals to try thei. honesties."

Shakespeare constantly so used it; notably in the phrase: "Wives may be merry, and yet honest too." *Merry Wives*, IV., 2.

In 1661, Pepys, in the *Diary* of August 11, gives it in this sense.

In 1711, Steele, in the "*Spectator*," No. 118, paragraph 2, says: "The maid is *honest* and the man dares not be otherwise."

In Fletcher and Rowley's "*Maid of the Mill*" it is said: "Her honesty was all her dower."

In 1749, Fielding, in "*Tom Jones*," XV., VIII., writes: "Miss Nancy was, in vulgar language, soon made an honest woman."

And Scott in "*St. Ronan's Well*," chapter 25, gives it a like meaning.

The only conclusion from these citations is that common usage has given to the word "honesty" the meaning of sexual propriety when the context so requires. In the question put to the witness the expression "honesty in living" was directly coupled with "morality and virtue." Clearly, it had no alien meaning, and the question as a whole was proper. The contrary ruling deprived the defendant of a substantial element of his defense.

Another matter controverted upon the trial was the age of the prosecuting witness. Upon this issue the trial court admitted, over the defendant's objection, a written certificate of baptism, in which the clergyman had given the date of birth. This was illegal evidence. It is true that the mother testified that her daughter was under the age of sixteen, but the jury saw the prosecuting witness, and upon the question of her age it may be that the clergyman's certificate had weight with them.

For these errors the judgment must be reversed.

HAIRSTON v. COMMONWEALTH.

97 Va. 754—32 S. E. Rep. 797.

Decided March 23, 1899.

ATTEMPT TO RAPE: *Verdict—Force—Insufficient evidence.*

1. A verdict, "We . . . find the prisoner guilty of attempted rape and fix his punishment at eight years in the penitentiary," is sufficiently certain.

2. Where there is no attempt to use force, no threat, no violence, and no evidence of an intention to use force, if necessary, to overcome the will of the prosecutrix, but only solicitation, a verdict of guilty will be set aside, and a new trial granted.

Plaintiff in error Hairston, convicted of attempted rape in the County Court of Henry county, brings error. Reversed.

William M. Peyton, for the plaintiff in error.

A. J. Montague, Atty. Gen., for the Commonwealth.

RIELY, J. The first assignment of error is that the verdict of the jury is defective for uncertainty.

The indictment contains a single count, and charges the accused with an attempt to commit rape upon a certain female. The verdict of the jury is in these words: "We, the jury, find the prisoner guilty of attempted rape, and fix his punishment at eight years in the penitentiary."

The verdict of a jury in a criminal case is always to be read in connection with the indictment; and if, upon reading them together, the meaning of the verdict is certain, this is sufficient. *Hoback's Case*, 28 Gratt. 922. The indictment in this case charges the prisoner with an attempt to commit rape, and names the female upon whom the attempt was made. The verdict is a direct response to the issue of guilty or not guilty, which the jury were sworn to try. It finds the prisoner guilty of attempted rape, and ascertains his punishment. It was not necessary to insert his name in the verdict. The verdict, by the use of the word "prisoner," identifies the person named in the indictment, in custody, and on trial, as the person guilty of the offense, and finds him guilty of attempted rape; that is, of the attempt to commit rape, with which he is charged in the indictment. This is plainly the meaning of the verdict.

The only other assignment of error is the refusal of the court to grant the accused a new trial. The insufficiency of the evidence to warrant the verdict was the ground of the motion for a new trial.

The court is of opinion that this error is well assigned. To sustain the charge of an attempt to commit rape, there must be evidence of force, or of an intention on the part of the offender

to use force in the perpetration of the heinous offense, if it should become necessary to overcome the will of his victim. 1 Bish. Cr. Law (2d ed.), § 731; 3 Am. & Eng. Ency. Law (2d ed.) 258; *Commonwealth v. Fields*, 4 Leigh, 648; *State v. Massey*, 86 N. C. 658; and *State v. Kendall*, [73 Iowa, 255], 5 Am. St. Rep. 679.

The evidence of the prosecutrix is that the accused came to her father's house, riding upon a mule, and commenced talking to her, as she stood in the edge of the yard, about paying him for some work he had done, and followed it up by making to her an indecent proposal. He then got down off his mule, and started towards her, renewing his indecent request, and making a motion at her and very close to her as if he would pull up her dress, but did not touch her. She jumped to one side, and dodged him, screamed, picked up a stone, and threw it at him; that he advanced on her after she threw the stone; and that she then threw three more stones at him, when he turned away, got on his mule, and left.

The occurrence took place between twelve and one o'clock in the day, in the edge of the yard of the father of the prosecutrix, about fifty yards from the house, and in sight of, and very near, the house of a colored family. No one witnessed the occurrence or heard the screams. The father and mother of the prosecutrix were in the house, sick in bed, and her sister was in the back room, washing dishes, with the front door shut.

The whole evidence, taken together, is of a very doubtful and inconclusive character. There was no attempt to use force, no threat, only solicitation. The absence of all violence, and of evidence of any intention to use force, if necessary to overcome the will of the prosecutrix; the time and the place, and all the surrounding circumstances, invest the charge with very great improbability. However reprehensible is the conduct of the accused, the evidence is consistent with a desire on his part to have sexual intercourse with the prosecutrix, but without evidence of an intention to use force, if necessary, to gratify his desire,—only persuasion. "The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence."

The court is of opinion that the county court erred in refusing to grant the plaintiff in error a new trial, for which error its judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

BAILEY V. STATE.

57 Neb. 706—78 N. W. Rep. 284.

Decided February 9, 1899.

RAPE: *"Previously unchaste" female—Jurisdiction—Information—No estoppel against a criminal defendant—A conviction must be supported by the "letter" of the law.*

1. A woman not "previously unchaste," within the meaning of section 12 of chapter 4 of the Criminal Code, is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted.
2. The object of the statute is to protect the virtuous maidens of the Commonwealth—to protect those girls who are undefiled virgins; and a female, under eighteen years of age and over fifteen years of age, who had been guilty of unlawful sexual intercourse with a male, is not within the law.
3. The gist of the crime denounced by this statute is the defilement of a virgin, with her consent, over fifteen and under eighteen years of age, by a man over eighteen years of age.
4. The prisoner was indicted for rape, under the statute, for having, in Nebraska, had sexual intercourse, with her consent, with a girl over fifteen and under eighteen years of age, and not "previously unchaste." The evidence showed that the female, after she was fifteen years of age, and before her sexual intercourse with the prisoner in Nebraska, had had illicit sexual intercourse for the first time with him in the State of Iowa, and that she had sustained such relations with no other man than the prisoner. *Held*, that the evidence would not sustain a conviction.
5. In such an indictment may be included all acts of unlawful sexual intercourse which occurred between the prisoner and the prosecutrix in the State of Nebraska after the female became fifteen years of age, and which were not barred by the statute of limitations.
6. The State, in a criminal prosecution, may not invoke against the prisoner the doctrine of estoppel.
7. To sustain a criminal conviction, it is not enough for the State to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law.

(Syllabus by the Court.)

Error to the Douglas County District Court; Slabaugh, Judge.

George C. Bailey, convicted of rape, brings error. Reversed.

McFarland & Altschuler, for the plaintiff in error.

C. J. Smyth, Atty. Gen., and *W. D. Oldham*, Dept. Atty. Gen., for the State.

RAGAN, C. Section 12 of chapter 4 of the Criminal Code of this State, among other things, provides: "If any male person of the age of eighteen years or upwards shall carnally know or abuse any female child under the age of eighteen with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, every such person so offending shall be deemed guilty of a rape." George C. Bailey was indicted in the district court of Douglas county, under the statute just quoted, for having on June 13, 1898, had sexual intercourse with one Clara Blue with her consent; she then and there being a female of the age of sixteen years, and not previously unchaste. Bailey was convicted and sentenced to the penitentiary, and brings that judgment here for review on error. Of the numerous assignments of error argued in the brief, it would subserve no useful purpose to notice but two.

1. The evidence in the bill of exceptions shows without contradiction that in June, 1898, Clara Blue was between sixteen and seventeen years of age; that no man had ever had sexual intercourse with her, except the prisoner; that in March of that year she lived in the State of Iowa; that the prisoner formed her acquaintance at an hotel in Pacific Junction, in that State, in the month of March, 1898; that with her consent he then had sexual intercourse with her in Iowa; that subsequently, in June of said year, she came to the city of Omaha, in this State, and on the 13th of said month, and at divers other times before and after that date, he again had sexual intercourse with her in this State, she consenting thereto. As to the meaning of the phrase "previously unchaste," found in the statute just quoted, the district court instructed the jury as follows: "By the phrase 'unchaste,' as used in the law defining rape, is meant lewd; having an indulgence of lust; and, as applied to a female child

previously unchaste, means that she was previously before the act complained of lewd, or had an indulgence for lust." The prisoner took an exception to the giving of this instruction. We do not approve of the construction placed upon the phrase in the statute, as embodied in this instruction. The definition of an unchaste woman, within the meaning of the statute, is by the district court given as a lewd woman,—a woman possessing an indulgence for lust; or, as we understand the court's definition, a woman, to be unchaste, within the meaning of this statute, must be a woman of notoriously lewd and lascivious habits; in the ordinary language of the day, she must be a "prostitute." We do not think this is the meaning of the statute. A woman not "previously unchaste," within the meaning of the statute, is one who has never had unlawful sexual intercourse with a male prior to the act of intercourse for which the prisoner stands indicted. The object of the statute quoted was to protect the virtuous maidens of the Commonwealth,—in other words, to protect those girls who were undefiled virgins; and a female, under eighteen years of age and over fifteen years of age, who has been guilty of unlawful sexual intercourse with a male, is not within the act.

2. But the evidence in this record does not sustain the verdict on which the judgment rests. The material allegations of the indictment are that the prisoner was a man over eighteen years of age; that in Douglas county, Nebraska, with her consent, he had sexual intercourse with Clara Blue; that she was then and there sixteen years of age, and not "previously unchaste." The latter averment was not only not proved by the State, but the undisputed evidence shows that Clara Blue, prior to the date of her intercourse with the prisoner in Nebraska, was unchaste. The fact that she was first deprived of her virginity by the prisoner does not strengthen the State's case. That first illicit sexual act of the female and prisoner occurred in the State of Iowa. Had the first defilement of the girl by the prisoner occurred in Nebraska, instead of Iowa, on the date it did, and which was prior to the one charged in the indictment, then the first defilement would be no defense to the prisoner on an indictment for the second, since both would have been within the statute of limitations, and each intercourse a part of the

crime charged in the indictment. But to sustain this conviction on this evidence is to punish the prisoner here for the crime committed in another jurisdiction. The statute is a harsh one, and the penalties for its violation severe. To sustain a conviction under it, the evidence must show beyond a reasonable doubt, among other things, that the female with whom the sexual intercourse was had was, prior to that intercourse, sexually pure,—chaste as Diana. To show that she was chaste prior to the sexual act in Nebraska, but for her previous seduction by the prisoner in another State, does not satisfy the statute. Suppose the statute of limitations for this crime was one year, instead of three; suppose the prisoner, in Nebraska, deprived this girl of her virginity when she was sixteen, and she did not again carnally know any man until she was seventeen and a half, and then, with her consent, sexual intercourse occurred between herself and the prisoner, and he is indicted therefor. Is it not clear that the intercourse which occurred when she was sixteen would, if established, afford the prisoner a complete defense? It would, because after the second sexual act she was not chaste. The first illicit intercourse would not be included in, and a part of, the crime charged in the indictment. That act would be barred by the statute of limitations. The statute does not punish men for unlawful sexual relations with a prostitute over fifteen years of age, nor for such relations with a female who, though not a prostitute, has already submitted herself to the illicit embraces of a male, capable of performing the copulative act.

3. But it is said by counsel for the State that to allow the prisoner to urge as a defense here the intercourse which took place between himself and the prosecutrix in the State of Iowa would be permitting the accused to take advantage of his own wrong. This is simply saying that the accused is estopped from asserting the truth of his unlawful conduct in another jurisdiction because that conduct would establish innocence of the crime which he is charged with having committed in this State. But the State, in criminal prosecutions, may not invoke against the prisoner the doctrine of estoppel. *Moore v. State*, 53 Neb. 831. To sustain a criminal conviction, it is not enough for the State to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt

that he has offended against the very letter of the law. *Moore v. State*, 53 Neb. 831; Crim. Code, § 251. Here the prisoner is charged with having had in this State sexual intercourse, with her consent, with a girl sixteen years of age, she being prior thereto chaste. At the time the intercourse occurred in this State the female was not chaste. Prior to the prisoner's intercourse with her in Iowa, so far as this record shows, she was chaste; and in Iowa—for we must presume the laws of that State to be the same as ours—he robbed her of her virginity, and committed the crime for which he is convicted here.

The judgment of the district court is reversed.

NOTE.—*Husband as an accomplice in raping his wife.*—See *State v. Haines*, 51 La. Ann. 751, 25 So. Rep. 372 (1899). For lack of space we cannot give this case in full, but give the following selection from the syllabus by the court, stating questions involved:

1. The husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract.
2. To hold a husband charged with rape upon a woman who is his wife, or to convict him, it must appear that the carnal knowledge of the woman constituting the rape was accomplished through a man other than the husband, and that the husband procured it to be done, or assisted the other in the execution of their common purpose.
3. But where the "other man" in the case, demanding a severance, is tried first, and acquitted, the prosecution against the husband falls, since he cannot be guilty of raping his own wife.

HOWARD V. STATE.

121 Ala. 21—25 So. Rep. 1000.

Decided May 18, 1899.

RESISTING ARREST: *Indictment—Void warrant.*

1. An indictment for resisting arrest, to comply with the Alabama Code, need not state the date of the resistance, nor for whose arrest the warrant was issued.
2. A warrant which, as a cause for arrest, recites, "Complaint on oath having been made before me that the offense of threatening breach of the peace has been committed," does not state a crime, is not a sufficient peace warrant, and is void.
3. It is not a crime to resist one who endeavors to make an arrest under a void warrant.

Jack Howard, convicted in the City Court of Montgomery, Hon. A. D. Sayre, Judge, of resisting an officer who was attempting to serve a warrant or writ of arrest, issued by a justice of the peace, appeals. Reversed.

Hill & Hill, for the appellant.

Chas. G. Brown, Attorney-General, for the State.

Tyson, J. The indictment contained three counts. Two of them were framed under section 5463 of the Code, and the other under section 5466. Each count was demurred to. The assignments of the demurrer raised the question that the warrant or writ of arrest was not sufficiently described. The contention was insisted upon that the indictment should have averred the offense mentioned in the warrant or writ of arrest, its date of issuance, and the name of the person for whom issued.

No such particularity is prescribed by the form for the indictment under section 5463. In fact, it is there expressly declared that describing the process generally is sufficient. Form 73, p. 334, Code.

No form is found for indictments under section 5466. The count in the indictment under consideration follows the language of this section, and no more particularity in the description of the warrant or writ of arrest is required in an indictment under this section than is required under section 5463. There was no error in overruling the demurrer.

The warrant or writ of arrest introduced in evidence against the objection of defendant describes the offense as, "threatened a breach of peace." There were several objections urged against its introduction in evidence. Those worthy of consideration may be stated to be that it was void upon its face, in that it charged no offense known to the law, and that the justice of the peace issuing it had no jurisdiction to do so.

Section 5162 of the Code authorizes the institution of proceedings before magistrates to keep the peace. The purpose of the statute is to prevent the commission of an offense against the person or property of another, and to this end a warrant may issue for the arrest of the person who has threatened or is about to commit an offense on the person or property of another; and,

if there is just reason to fear the commission of such offense, the defendant must be required to give security to keep the peace, etc. Secs. 5163, 5168. It is a preventive measure which the magistrate is authorized to set in motion to restrain the defendant from the commission of an offense against the person or property of another, and not a proceeding to try the person charged with the commission of a criminal offense. To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, as we have said, he may be restrained from so doing by proper proceedings, but not punished by fine or imprisonment. True, should the defendant fail to give the security required by the magistrate, it is the duty of the magistrate to commit him to jail until he enters into the undertaking with sufficient sureties for the time he is required to keep the peace, not more than twelve nor less than six months. But this commitment to jail is predicated upon his failure or refusal to give the security required by the order of the magistrate, and not as the punishment for the commission of an offense.

The warrant issued for the arrest of the defendant in the case under consideration was in these words: "Complaint on oath having been made before me that the offense of threatening breach of peace has been committed in said county, and charging Jack Howard with the commission of said offense, you are therefore commanded to arrest said Jack Howard and bring him before me instantler." The gist of this warrant is that the defendant had committed the offense of threatening a breach of the peace. This is emphasized by the language following, "charging Jack Howard with the commission of said offense." Howard had committed no offense, as shown by the language in the warrant. Had the warrant read that he has threatened an offense on the person or property of another, he would have been apprised that he was required to appear for the purpose of having the question adjudged as to whether or not he would have to give security to keep the peace, and that he was not charged with a criminal offense. When this warrant was shown him or read to him, he doubtless believed, and had a right to believe, nor was there a clear inference deducible from the language to the contrary, that the attempt to arrest him was for an offense,

for which he was to be punished, which designated offense was unknown to the law, and not punishable. The warrant was void upon its face, and the defendant was under no legal duty to submit to an arrest. *Noles v. The State*, 24 Ala. 672.

This renders it unnecessary to review the other questions raised in the record. The judgment of conviction must be annulled and reversed, and the cause remanded.

Reversed and remanded.

STATE v. ROLLINS.

50 La. Ann. 925—24 So. Rep. 664.

Decided May 16, 1898.

RIGHTS OF THE ACCUSED: *The accused's right to assistance by counsel to prepare motion for new trial.*

1. Though the law has not imposed upon courts the duty of informing accused parties that they are entitled to counsel, and asking them whether they desire that counsel should be assigned to them, it has become almost universally the practice for them to do so *ex proprio motu*.
2. While the fact that a prisoner does not ask the court to assign counsel to him, and he chooses to appear by himself, and he is convicted, does not entitle him to a new trial because of his want of counsel (*State v. Kelly*, 25 La. Ann. 382), it is none the less a fact to be considered in connection with others, for the purpose of ascertaining whether, in any particular case, he has been accorded the full opportunities for defense which it is the duty of the State to extend to its people, even those who may be ultimately and deservedly found guilty of crime.
3. The right to move for a new trial is guaranteed to the defendant in the smallest civil cases. In criminal cases the same right exists, as also the additional right of moving in arrest of judgment for defects apparent on the face of the record. These rights may be waived by the parties, but they cannot be denied by the courts. The law contemplates the giving of reasonable opportunity for preparation and examination. To refuse a reasonable time for the exercise of a right is tantamount to a denial of the right itself. *State v. Gardner*, 10 La. Ann. 25.

(Syllabus by the Court.)

Appeal from the Twenty-Second Judicial District Court for the Parish of St. Bernard; Hon. Robert Hingle, Judge.

Moses Rollins, being accused upon two informations of criminal offenses, went to trial without the assistance of counsel. He was found guilty; after which he immediately secured the aid of counsel, who applied for time to prepare a motion for new trial; but the court, because the time for adjournment had arrived, requested counsel to state the grounds for the motion, which being done, the motion was overruled and sentence entered. The defendant appealed. Reversed.

A. E. & O. S. Livaudais, for the appellant.

M. J. Cunningham, Atty. Gen., and *Albert Estopinal, Jr.*, Dist. Atty. (*P. A. Simmons, Jr.*, of counsel), for the State.

NICHOLLS, C. J. On the 1st of March, 1897, two informations were filed against the defendant. The first charged that he had, on September 30, 1896, wilfully and maliciously, and with a dangerous weapon, to wit, a pistol, inflicted a wound less than mayhem upon one Wash Williams with the intent him, the said Wash Williams, to kill. The second charged that he had, on the 30th of September, 1896, carried, concealed about his person, a concealed weapon, to wit, a loaded pistol.

The minutes of the court of date of March 7, 1897, show that the accused was on that day brought to the bar, in the custody of the sheriff; that, being arraigned, on each of the charges he pleaded "Not guilty;" whereupon, on motion of the district attorney, the case was fixed for trial for March 16, 1897, and accused was released on bond. For some reason, unexplained, the cases were not tried on that day.

On the 7th of March of the next year (1898), the accused having failed to answer to his name when called, a bench warrant issued for his arrest, returnable March 8, 1898. On that day, the cases were fixed for trial for the 10th of the month. The minutes do not show that the accused was present when they were so fixed. The minutes of the 10th recite that "these cases, regularly fixed, came on their day for trial. Present: A. Estopinal, Jr., District Attorney, for State; the accused present in court, and represented in *propria persona*. The accused being ready for trial, the following persons [naming them] were duly called, presented, accepted, and sworn as the jury to try these cases.

... "The evidence being completed, these cases were submitted. The court charged the jury in relation to each of the charges of wounding with intent to kill, and carrying concealed weapons, ordered them to retire to their room to deliberate on their verdict, and to appoint their own foreman. After a short absence, the jury returned into court, and, through their foreman, Francis Bourg, returned a verdict of guilty as charged on each information; whereupon the court ordered the verdicts recorded, and the jury discharged from further consideration of the cases."

Defendant, through counsel, moved for a new trial, on the grounds: 1. Because the verdict of the jury was contrary to the law and the evidence. 2. Because the defendant had had no sufficient notice of the assignment of his cases for trial. 3. Because the accused, who was unprepared for trial, and had no counsel to represent him, was tried and convicted solely upon the testimony of the witnesses for the prosecution, and in the absence of his witnesses, whose names he had furnished to the proper officer, and which said witnesses could easily have been procured, they all being residents of the parish. 4. Because the accused, who is illiterate, and had no means to employ counsel, had every reason to believe that his witnesses would have been summoned (he having furnished their names to the committing magistrate, who had marked their names on the back of the affidavit), until the time when, during the trial, he caused the first of his witnesses to be called, when he discovered for the first time that none of his witnesses had been summoned. 5. Because, since the trial of the cause, his friends had procured him the assistance of counsel, and he then invoked the right to be permitted to establish his defense by lawful evidence, and to obtain the process of the court to procure the attendance of his witnesses.

The motion for a new trial was overruled.

The accused was brought to the bar, and sentenced.

The minutes recite that "the court, on the verdict of guilty of wounding with intent to kill, considering section 794 of the Revised Statutes, sentenced Moses Rollins to imprisonment in the State penitentiary at hard labor for a period of eight months, and to pay a fine of one dollar; and, on the verdict of

guilty of carrying concealed weapons, the court, considering section 932 of the Revised Statutes, sentenced Moses Rollins to pay a fine of fifteen dollars and costs, and in default thereof to suffer imprisonment in the parish jail for a period of twenty-five days."

Defendant filed a bill of exceptions to the action of the court in refusing a new trial.

This bill recites that, immediately after the verdict was rendered in the case, counsel for the accused applied for a new trial, or for time to prepare application for new trial; whereupon the court declared that this was the last day he intended to hold court in the parish for the present term, and requested counsel to state the grounds upon which would be based his said intended application; and said counsel having done so, in the manner above, and as well as the short time allowed and his knowledge of the case permitted, the judge, overruling said motion, proceeded forthwith to sentence the accused, under said verdict, and sec. 794, R. S., to pay a fine of one dollar and suffer imprisonment at hard labor for eight months. Whereupon counsel for accused reserved a bill of exception to the ruling of the court.

The district judge made the following statement upon the bill: "The trial took place on Thursday, March 10, 1898, it being the last day of the present term of the court. The accused was indicted for the offense at a prior term of this court, and his case continued to the present term, he being released on bond for his appearance thereto. On Monday, March 7, 1898, the prisoner having failed to appear for trial, on motion of the district attorney a bench warrant issued for his arrest, and on Tuesday, March 8th, the following day, being brought into court, his case was fixed for trial for Thursday, March 10, 1898. On the day of his trial, the defendant was asked the following question by the court: 'Do you wish to be tried by the judge or by the jury?' He answered: 'By a jury.' The sheriff was then ordered to call the names of the witnesses summoned by the State and by the defendant, which he did, in the presence of the accused, and the trial was then proceeded with, without objection on the part of the defendant. 1. The verdict rendered was in accordance with the law and the evidence. 2. The de-

defendant had sufficient notice of the assignment of his case for trial. 3. The prisoner did not ask the court to assign an attorney to defend him, and chose to appear by himself, nor did he ask for a continuance on any ground whatsoever. 4. The names of the witnesses furnished to the sheriff by him were summoned, with the exception of one who could not be found. These witnesses were present at the trial of the cause, and their testimony was given on behalf of the defendant. The services of counsel were secured only after verdict, and at the very moment that the defendant was to receive sentence. It was then their motion for a new trial was made. 5. The defendant or his friends had ample time prior to the trial to procure the assistance of counsel."

No assignment of error was made in the Supreme Court, nor was any brief filed on behalf of appellant. His counsel argued the case orally.

The accused in this case went to trial without the assistance of counsel. There is no pretense that the court informed him that he was entitled to counsel, or asked him whether he desired that counsel should be assigned to him. Though the giving of this information and the asking of this question have not been imposed upon courts by law, it has become almost universally the practice for them to do so *ex proprio motu*. While it has been held that, if a prisoner does not ask the court to assign an attorney to defend him, and chooses to appear by himself, and he is convicted, the want of counsel is no good reason for a new trial (*State v. Kelly*, 25 La. An. 382), it is none the less a fact to be considered in connection with others, for the purpose of ascertaining whether, in any particular case, he has been accorded the full opportunities for defense which it is the duty of the State to extend to its people, even those who may be ultimately and deservedly found guilty of crime.

The minutes do not show that the appellant was present when the case was assigned for trial. *Per se*, standing alone, that fact might not be good ground for a new trial, but this also is a circumstance to be considered. The district judge, in his reasons for refusing a new trial, states that appellant was present at that time; but that is not the proper place where such fact should appear. Defective minutes are not to be eked out by

statements so made by the judge. The case was tried two days after the assignment. The clerk in his minutes recites as a fact that the accused was ready for trial when the case was called, but the minutes do not declare that he was asked whether he was ready, and answered that he was. As matters stand, the statement is a mere conclusion of the clerk. If the court's statement be taken as showing the facts of the case at that time, he was not asked that question at all, but simply "whether he would be tried by the court or the jury;" and, having answered, "By the jury," the jury was at once called, impaneled, and sworn, and the case at once disposed of. The court says the services of counsel were secured only after verdict and at the very moment that the defendant was to receive sentence; "that it was then that motion for new trial was made." That is true, but the record shows that the verdict in the case, the motion for a new trial, the sentence of the accused, and the adjournment of court all followed in rapid succession on the same day. The motion for a new trial comes before us in a very irregular manner. It is unsworn to, and reaches us as part of the minutes of the court. The reason for this appears to have arisen from the fact that the court declined to grant counsel of accused time to write out his motion, and insisted that he should state his grounds for the same at once. The reasons seem to have been assigned verbally, and to have been taken down by the clerk. We see no reason for this haste. Counsel for accused could not have acted any more promptly than they did.

The judge states that all this happened upon the day that he intended to adjourn the court; but this intention to adjourn should have given way, at once, before the reasonable demand made for time to prepare the legal motions which the law allows to be made between verdict and sentence. There is no reason assigned by the court why this hasty adjournment should have been made on that day, and we see none.

In *State v. Gardner*, 10 La. An. 25, this court said: "The right to move for a new trial is guarantied to the defendant in the smallest civil cases. In criminal cases the same right exists, as also the additional right of moving in arrest of judgment for defects apparent on the face of the record. These rights may be waived by the parties, but they cannot be denied by the

courts. To refuse a reasonable time for the exercise of a right is tantamount to a denial of the right itself. This is exemplified in the present case. According to Hawkins, the rule in the King's Bench, in cases of misdemeanors, was that four days should elapse between the conviction and the judgment, if there were so many days remaining in the term. It is said by Chitty that the court, if they grant a rule *nisi*, will, at the instance of the party applying, make it a part of the rule that the defendant should have a certain time, *e. g.*, three days, to move in arrest of judgment, after they shall have given their opinion upon the motion for a new trial, or the defendant may obtain a rule in the alternative,—though, as the motion in arrest may be made at any time before judgment is pronounced, it would seem that such a special rule is not necessary. The analogy between criminal and civil proceedings, in the English court, in regard to these matters of practice, is very striking. Our Code of Practice relates to civil proceedings alone, but, by analogy, it may occasionally afford a safe guide to criminal proceedings. We are not called on to determine what a reasonable time for the preparation of the motion in question would be; we only say that the judge erred in refusing to grant any time whatever." Those views are thoroughly correct.

It will not do to say that the motion for a new trial was, in fact, made and overruled. The law contemplates a motion made with reasonable opportunities for preparation, and, in this case, for examination. It may be that the accused was properly found guilty, and that he should be punished. If that be true and he be not punished now, it will demonstrate that harsh proceedings in the district court are not the surest and best methods of securing the ends of justice.

We are of the opinion that the sentence appealed from should be, as prematurely rendered, set aside, and the cause remanded to the district court, and there reinstated on the docket, with leave to the defendant to make formal motions for a new trial and in arrest of judgment, and for further proceedings according to law, and it is hereby so ordered and decreed.

SPENCER V. STATE.

106 Ga. 692—32 S. E. Rep. 849.

Decided March 14, 1899.

ROBBERY: *Distinctions between robbery and larceny from the person—Force, violence and intimidation necessary elements of robbery.*

Suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner or injury to his person, does not constitute robbery.

(Syllabus by the Court.)

Frank Spencer, *alias* Joe Brown, convicted of robbery in the Glynn County Superior Court, Hon. J. L. Sweat, Judge, brings error. Reversed.

Owens Johnson and *A. D. Gale*, for the plaintiff in error.
John W. Bennett, Solctr. Gen., for the State.

FISH, J. Frank Spencer, *alias* Joe Brown, was indicted and tried for the offense of robbery. From the evidence submitted by the State (there was no evidence introduced by the defendant) it appears that Mrs. O'Connor and another lady were standing on a street in the city of Brunswick, when the accused approached them, and asked, "Will you please tell me where Capt. Dart lives?" and just as he said this he snatched a pocket-book containing \$7.50 from the hand of Mrs. O'Connor, and ran away with it. She testified that she did not have time to hold on to the book, it was all done so quickly; that she just had it in her hand, as ladies usually carry pocketbooks, and was not expecting it to be taken away from her, and was therefore not grasping it unusually tight; that she did nothing at all to prevent him from taking it; that she did not consent or object to his taking it, as she did not have time to do either; that the accused had it, and was gone, before she knew it. The court charged the jury: "If you shall find it to be true that this defendant, in the county of Glynn, and on the date named, coming into contact with Mrs. Mary O'Connor upon the sidewalk, and entering into some conversation with her, or propounding some question to her, or to others who were with her, if you shall find that she held her purse openly in her hand, and this de-

defendant, in full view of her, and with her knowledge, she seeing him, suddenly snatched her purse and its contents from her, without her consent, and ran off with it,—the court charges you that if you shall find that to be true, and that this was done by this defendant with intent to steal the same, that would make, under the law of this State, a case of robbery, and in such event it would be your duty to convict the defendant.” There was a verdict finding the accused guilty of robbery. He moved for a new trial upon the grounds that the verdict was contrary to law and the evidence, that the charge above quoted was error, and upon other grounds not necessary, in the view which we take of the case, to be passed upon. The motion was overruled, and he excepted.

The question which controls this case is whether the facts as proved constitute the offense of robbery, which is “the wrongful, fraudulent, and violent taking of money, goods or chattels from the person of another by force or intimidation, without the consent of the owner.” We have no difficulty in deciding that this, under the facts, is not a case of robbery. Section 177 of the Penal Code, referring to larceny from the person, the general definition of which is given in the preceding section, says: “Any sort of secret, sudden, or wrongful taking from the person with the intent to steal, without using intimidation, or open force and violence, shall be within this class of larceny, though some small force be used by the thief to possess himself of the property: *Provided*, there be no resistance by the owner, or injury to his person, and all the circumstances of the case show that the thing was taken, not so much against as without the consent of the owner.” The facts of this case bring it clearly within the provisions of this section. The accused, without using any intimidation, suddenly snatched the purse from the hand of Mrs. O'Connor, and ran off with it. There was no injury to her person, nor any resistance or struggle to prevent him from taking the purse. All the circumstances of the case show that the purse was taken, not so much against as without her consent. The charge of the court was erroneous, because, under the hypothetical case stated by the court, without more, the offense would not be robbery, but would be larceny from the person, under the provision of the last-quoted section of the Penal Code.

In *Fanning's Case*, 66 Ga. 167, the accused slipped his hand into a lady's outside pocket, and furtively took therefrom a purse of money. Before he got the purse entirely out, she felt the hand, and tried to seize it, but the thief had succeeded, and the purse was gone. In the effort of the thief to extract his hand and the purse, the pocket was torn. She rushed upon him, and caught him by the coat, which, in his struggle to escape, was left, torn, in her possession. It was held that the offense was larceny from the person, and not robbery, because there was no force or intimidation in the act.

Counsel for the State strongly relies upon *Burke's Case*, 74 Ga. 372, contending that the facts there and those in the case at bar are substantially the same. But there is evidently not a full statement of the facts in that case as it is reported in 74 Ga., for it does not appear in such report that the owner of the money taken by Burke made any resistance, but simply that the accused grabbed four dollars from his hand, and ran; that the owner called after him, etc. Yet, the headnote, which is sound law, is as follows: "Where, before the felonious taking of money by one person from another, the latter makes resistance, and the taking is not only without his consent, but against it, the crime is robbery, not larceny from the person." The record of the case is not at hand, but the recorded opinion of Mr. Justice Hall is as follows: "The question made in his case is that the defendant, who was convicted of robbery, was, under the evidence adduced on the trial, guilty of nothing more than larceny from the person. Both the judge and the jury who tried the case were of a different opinion, and, if the testimony is to be credited, their conclusion seems to be supported. It is insisted that this was a secret, sudden, and wrongful taking by the defendant of the prosecutor's money privately, and without his knowledge, from his person; and that the theft was unaccompanied either by force or intimidation, one or the other of which is essential to constitute the offense of robbery. Code 1882, §§ 4389, 4410, 4412. According to the last-cited section of the Code, however, where there is 'resistance' by the prosecutor, and 'all the circumstances of the case show that the thing was taken against his consent,' this constitutes the force contemplated by the law defining robbery as one of its ruling ele-

ments. 'If there is a struggle to retain the possession of the property before it is taken, it is the "force" of our Penal Code.' *Long's Case*, 12 Ga. 294; *Fanning's Case*, 66 Ga. 167. If there be 'resistance' before the felonious taking is complete, and that taking be against, not simply without, the owner's consent, this, too, under our Code, is robbery, and is one of the decisive tests distinguishing it from larceny from the person. There was in this case evidence both of 'resistance' by the owner and of a struggle between him and the defendant before the money was snatched from his person and carried away by defendant." This last sentence in the opinion in *Burke's Case*, alone, shows the difference between the facts in that case and those in the case which we are now considering. In *Doyle's Case*, 77 Ga. 513, the prosecutor agreed to treat the accused to a drink, and took out his pocketbook to pay for it. He had the book in one hand, and in the other a rubber strap which he had taken from around it. In the pocketbook was a five-dollar bill with one end sticking out. The accused extracted it from the book with a quick jerk, and passed it to a confederate, who made off with it. There was no struggle and no threats; the accused merely snatched or jerked the money from the pocketbook, which the prosecutor held in his hand. It was held that these facts did not constitute the offense of robbery, and the ruling was put on *Burke's Case*, *supra*. Mr. Justice Hall, who also delivered the opinion in that case, said that, in view of the fact that almost every community is infested with thieves, who throw unsuspecting persons off their guard, and snatch money or other valuables from their persons, the court unanimously recommended to the General Assembly that such offense be made robbery.

Counsel for the State also cites *Usom's Case*, 97 Ga. 194, 22 S. E. Rep. 399, but in that case there was evidence both of resistance by the owner of the satchel and of a struggle between her and the accused before it was pulled from her hand, and the case is directly in line with those which we have cited above.

The distinction between robbery and larceny from the person pointed out in our Penal Code and the decisions of this court above referred to is one that is generally recognized. "Snatching, which is a sufficient asportation in simple larceny, carries with it or not the added violence of robbery, according as it is

met or not by resistance." 2 Bish. New Cr. L., § 1167, and cases cited. See Clarke's Crim. Law, 285. "The mere snatching a thing from the hands or person of another, without any struggle or resistance by the owner, or any force or violence on the part of the thief, does not amount to robbery." 21 Am. & Eng. Enc. L., 420, and cases cited in note 5. "With respect to the degree of actual 'violence,' where the taking is effected by that means, it appears to be well settled that a sudden snatching from a person unawares is not sufficient." 2 Russ. Cr. (6th ed.), p. 88.

Judgment reversed. All the justices concurring.

SMITH ET AL. V. STATE.

76 Miss. 728—25 So. Rep. 491.

Decided April 10, 1899.

SCIRE FACIAS: *Forfeited bail bond—Service—Variance.*

1. A judgment by default is erroneous when not supported by service as required by statute.
2. Where personal service is had, followed by a judgment by default, and appeal, no advantage can be taken of a variance between the writ of *scire facias* and the bond, the bond not being a part of the record in that proceeding.
3. A fatal variance as to the date in the judgment *nisi* and the final judgment is reversible error.

Appeal from the Circuit Court of Claiborne County; Hon. William K. McLaurin, Judge.

Daniel H. Smith, Jr., being indicted for keeping a gaming table, gave bail with two sureties. He appeared at the next term of the circuit court and pleaded guilty of gambling. The plea was accepted and a judgment entered suspending sentence, but condemning defendant to pay costs and stand committed until such costs be paid. At the following term, the judgment *nisi* referred to in the opinion was rendered against the defendant and his sureties, because of his failure to respond when called. A writ of *scire facias* was issued to Claiborne county, and was served on the sureties, but returned "not found" as to

the principal. An *alias* writ was issued to Hinds county and returned "not found" as to the principal. A final judgment being entered by default against all parties, they appeal. Reversed.

Martin & Anderson, for the appellants.

Wiley N. Nash, Atty. Gen., for the State.

WHITFIELD, J. As to Daniel H. Smith, Jr., the principal, the judgment is erroneous—being by default,—because there was no personal service on him, nor were there, as required as an equivalent therefor by section 1396 of the Code of 1892, "two writs of *scire facias* returned by the proper officers of the county where the bond or recognizance was entered into 'not found.'" *Stafford v. State*, 60 Miss. 928.

The sureties having been personally served, and having failed to appear, cannot predicate error here of a variance between the bond and the *scire facias*; because, in such case, the bond is "not properly a part of the record of that proceeding, but must be brought before the court by plea of *nul tiel record*, or other appropriate plea." *Ditto v. State*, 30 Miss., at p. 128. But there is a fatal variance between the judgment *nisi* and the judgment final, as to the date of the judgment.

Say the court in *Ditto v. State*, 30 Miss. 128: "Where the *scire facias* is not supported in a material respect by the judgment *nisi*, a judgment final, inconsistent with the judgment *nisi*, is erroneous, and, if to a party's prejudice, must be reversed." To the same point, identically, is *Bridges v. State*, 24 Miss. 154.

Reversed and remanded.

LOVELESS ET AL. V. STATE.

Tex. Court of Crim. App.—50 S. W. Rep. 361.

Decided March 8, 1899.

SCIRE FACIAS: *Misdescription of offense in bail bond.*

A bail bond which does not describe the crime for which it is given, either by its name or by its essential elements, is insufficient.

Appeal from the Kaufman County Court; Hon. John Vesey, Judge.

Judgment upon a bail bond. Reversed.

J. D. Cunningham and Lee R. Stroud, for the appellants.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellants in error, M. L. Loveless, T. J. Reynal, P. G. Lewis, C. F. Priest, and J. B. Payton, sued out a writ of error against the State of Texas, appellee in error. The case, as indicated by the record before us, is one wherein the State of Texas took a forfeiture upon a certain bail bond, wherein the appellant in error M. L. Loveless was principal, and the other appellants stated above were sureties.

In the view we take of the case, it is only necessary to consider appellants' first assignment of error, as follows: "Said writ is insufficient as pleading, and said bond described therein is likewise insufficient, because neither said bond nor the writ of *scire facias* distinctly describe any particular offense; the only description given being 'unlawful selling of intoxicating liquors,' which language included many distinct offenses,—one described in article 398, another in article 399, another in article 400, another in article 401, another in article 402, another in article 404 *et seq.* [of the Penal Code];—and it cannot be told which of the numerous crimes is referred to." It is well settled that, where a bail bond or recognizance is taken after indictment found, the very offense of which the principal stands charged in the indictment must be named in the bond, not the class of offense. In the case of *Ramsey v. State*, 36 Tex. Crim. Rep. 392, 37 S. W. Rep. 330, the court said, where this exact question came up for consideration in a recognizance: "Appellant is charged with selling intoxicating liquors in a local-option precinct. The recognizance recites that he 'stands charged in this court, by bill of indictment, with selling intoxicating liquors, and who has been convicted of said offense in this court,' etc. This recognizance, in order to be a valid undertaking in law, such as to attach the jurisdiction of this court on appeal, should have further recited those elements of the offense charged in the indictment, to wit, selling intoxicating liquors in a precinct where local option was in effect. Stating it in another

form, the recognizance must state the offense of which the appellant stands indicted. If it is an offense *eo nomine*, it is sufficient to so recite. If not, it must recite all the constituent elements of the offense in the recognizance. This has not been done, and it is fatally defective." It appearing from an inspection of the record before us that the condition of the bail bond upon which the forfeiture was taken states that the appellant M. L. Loveless "stands charged with the offense of unlawfully selling intoxicating liquor," the same defect exists in the bail bond in this case as existed in the recognizance in the case cited above. The law in reference to recognizances and bail bonds being the same, we hold that the bail bond in this case does not comply with the law in the respect indicated. For the errors discussed, the judgment of the lower court is reversed, and the cause dismissed.

DAVIDSON, P. J., absent.

STATE V. MATTHEWS.

148 Mo. 185—49 S. W. Rep. 1085.

Decided February 21, 1899.

SELF-DEFENSE: Murder and manslaughter—Express malice—Right of attack in self-defense—Defense of property—Instructions.

1. One who kills another in self-defense is not guilty of murder, though he bore express malice towards deceased.
2. It is not generally true that the right of self-defense does not imply the right of attack. One who has reasonable ground to believe that another intends to do him great bodily harm, and that such design will be accomplished, need not wait until his adversary gets advantage over him, but may immediately kill the latter, if necessary to avoid the danger.
3. The fact that one puts himself in the way of being assaulted by another, though he expects the latter will attack him, does not preclude him from setting up self-defense.
4. Though one is not justified in killing another who is tearing down and carrying away a fence belonging to the former, such killing is nothing more than manslaughter in the fourth degree, if done in a heat of passion engendered by the removal of the fence.
5. Where defendant shot deceased while the latter was removing the former's fence, an instruction that such fact did not justify de-

fendant is misleading, as it should also state that, if the killing was done in the heat of passion, it would be only manslaughter.

6. The fact that defendant claims that the killing was done in self-defense does not destroy the right to an instruction based on the claim that the killing was manslaughter.

Appeal from Douglas Circuit Court; Hon. W. N. Evans, Judge. Reversed and remanded.

A. H. Livingston, for the appellant.

Edward C. Crow, Atty. Gen., and *Sam B. Jeffreys*, Asst. Atty. Gen., for the State.

SHERWOOD, J. Indicted for murder in the first degree for killing one R. H. Morgan with a shotgun on the 17th of April, 1896, defendant being put upon his trial was found guilty of the second degree of that offense, and his punishment assessed at fourteen years in the penitentiary.

This homicide grows out of a disputed line, and a portion of a disputed rock fence, which, if removed, would open defendant's field and leave it uninclosed, and besides, would admit the water from the hillside to sweep over defendant's field. A lane running north and south divided the two fences of defendant and of Hammond, that of defendant lying on the west and Hammond's on the east of that lane, which, at its north end, opened into a public road which at this point ran west on the north side of defendant's field. The north end of the lane terminated at the foot of a steep hill, which was the water-shed of that immediate locality. The disputed boundary and rock lay between the northeast and the northwest corners of the respective fields. Hammond had lived on his farm about nineteen years and had never, so far as it appears, had any difference or difficulty with his *vis-a-vis* neighbor.

Defendant, forty-five years of age, had lived on his farm some fifteen years, in the county some thirty years, had been constable and justice of the peace some ten or twelve years, and bore an excellent reputation for being a peaceable and law-abiding citizen. On the other hand, Morgan, who had lived on the farm of Hammond, his step-father, for the space of about a year, and had rented it, it seems, for the year 1896, had the reputation, as some of the testimony tends to show, of being of a rash,

quarrelsome, turbulent and dangerous disposition, of which defendant was informed prior to the fatal occurrence, and he had been warned by some of his neighbors to be on his guard against Morgan. Indeed, it seems Morgan had conceived a strong dislike against defendant, and had made serious threats against him, and of these threats defendant had been told. About two weeks before the homicide, Morgan had gotten into an altercation with defendant's youngest son; had thrown rocks at him, and when remonstrated with by defendant on that occasion had invited defendant out of his field in order to beat him, saying to the latter that he had it laid up for him and intended to do him up.

Morgan was a large, stout man weighing one hundred and seventy-five to one hundred and ninety pounds, and was about thirty-eight years old. Defendant had been prosecuted for obstructing the public road at the northeast corner of his field, and was convicted of that offense. On termination of this prosecution, defendant, under the direction of the prosecuting attorney and sheriff as to where his fence should be erected, had set his fence back on his line as it was ascertained to be on the trial aforesaid, and he built this portion of the fence of rock in order to prevent his field being flooded. After this building of his fence back on his line, defendant was repeatedly annoyed by Morgan throwing his fence down, when defendant would rebuild it. This process of rebuilding had just been completed just after noon of the day of the homicide, by defendant and two or three of his nearest neighbors. In the afternoon, a passing neighbor having informed Morgan, who was at work in his field plowing, of the fence being replaced, he immediately quit his work, sent his team around by the bottom road, went by his house for his ax and pistol, and with Hammond, his step-father, and Mrs. Hammond, his mother, he went to where the rock wall had been replaced, taking with him two chains. The others of the family, two grown women, and two boys, one twelve years and the other younger, all went to what was termed the "rock pile," as the rock wall at the *locus in quo* was called. Arriving there, they all went to work tearing down defendant's fence and placing the rock thus obtained on that of Hammond. Defendant was in his field cutting sprouts; his son, who was in the

field also and plowing, but somewhat nearer to the rock wall than his father, saw Morgan and called his father's attention to it, whereupon defendant, looking up, saw Morgan coming down the hill toward the rock wall, at a brisk walk or run. He had on his arm an ax, and defendant thought he saw him have also a pistol. Behind Morgan were his step-father and mother. Defendant also noticed the others of the party proceeding to the same point with horses, etc. Thinking it prudent to do so, defendant went to his house and got a shotgun and returned to the field and went towards the fence where Morgan and the others were tearing defendant's fence down, and when defendant got within about thirty steps of him where they were tearing the fence down, Morgan said to him: "Don't come any closer." Defendant told him to go away and not disturb his fence, when Morgan replied with foul and abusive language.

Whether defendant had his gun presented at Morgan at the time or not is the subject of conflicting evidence. Some of the testimony shows that it was thus carried; other that defendant merely carried it in his hands, and other still, that it was on his shoulder. After testifying as above stated, with regard to what Morgan said to him, defendant continued: "I kept insisting that Morgan get away, that I didn't want any trouble with him, and that that was my fence, and he very well knew the court had so decided, and, if he thought it wasn't, to go into court, and when the court decided it was his, he should have it, and not until then. He kept on abusing me, and then he had a pistol; the first I saw of it he was behind the wall from me, and he kind of scooted down by the side of the tree, and I could just see the pistol and a little side of his face, and when he did that I turned and walked a few steps right around towards the lane; I was out from the lane a little ways, and about that time his mother came out and commenced quarreling at me, and I said to the old lady, 'I didn't come over here to quarrel with women, it would look better if you were at the house.' I told her I didn't come to quarrel with the old lady, and it would look better if she was at the house, and I happened to think of myself again, that it was perhaps done to draw my attention, and when I noticed Morgan again he was up and a few feet from the tree, and I says again, 'Go away and don't tear my fence down, and

don't abuse me any more. I mean what I say.' I don't think I can repeat the language exactly that I used, and he stooped down and threw some rock from the wall and whirled around in that position (indicating), and that was the time the gun, I guess, fired very quickly. I was a southwest direction from Mr. Morgan, and he reached over just in this position and jerked some rock on, and as he raised up he threw himself in that position, and I thought he was going to draw his pistol; then I fired. I thought he was going to draw his pistol. He was not over four or five feet from where he presented the pistol at me."

There was other testimony tending to show that defendant threatened to shoot Morgan in case he did not quit removing the rock, and that Morgan had his team attached to a stone and had just started to drive the team off, when defendant fired; that the exact words used by defendant to Morgan at that moment were: "Damn you, if you move that I will shoot you," and Morgan answered: "You kiss my a——, you cowardly son-of-a-b——," and started his team, and that witness did not see Morgan have a pistol. The testimony of some of the witnesses corroborates that of defendant, and that of others is of a contrary effect.

The above statement affords a sufficient outline of the evidence to enable the law to be correctly applied to the facts thus recited. Proper instructions were given on the question of murder in the first and second degrees and they followed the usual formula. If defendant killed Morgan with express malice, he would be guilty of murder in the first degree, but this remark is, however, to be qualified by this observation: that even if defendant did kill Morgan with express malice, yet if he did so in his necessary self-defense, it would not be murder though defendant bore express malice. *State v. Rapp*, 142 Mo., *loc. cit.* 447, 448.

Relative to the question of self-defense, instruction 17 exhibits the insignia of that heresy which has so warped "the first law of nature" in this State that the original commentator thereon would not know that subject were he to encounter it in his pathway. In the first place, it is not generally true that "the right of self-defense does not imply the right of attack." This

is something which depends upon the circumstances of each individual case. A person about to be attacked is not bound to wait until his adversary gets "the drop on him" or "draws a bead on him," to use familiar but significant expressions, before he takes steps to prevent those occurrences from taking place.

As was aptly said by Wagner, J., in *State v. Sloan*, 47 Mo. 612: "When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterward turn out that the appearances were false, and there was, in fact, neither design to do him serious injury nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at his peril of making that guilt, if appearances prove false which would be innocence, had they proved true."

Nor is it true that a party who expects to be attacked has no right "to put himself in the way of being assaulted," etc. So long as defendant did no overt act towards Morgan he had a perfect right to go where he would, and the expectation of being assaulted cuts no figure in the case. *State v. Evans*, 124 Mo., *loc. cit.* 410, 411.

Besides, defendant was on his own *terra firma*, and being there had the right to repel with force the removal of his fence, as this was a forcible trespass, and an invasion of his property rights. But he had no right to kill Morgan because the latter tore down his fence, or carried it off, and his act in killing Morgan, unless done on the ground of self-defense, was not justifiable or excusable, but still it was not murder unless done with express malice.

On this subject Hawkins says: "Neither can a man justify the killing another in defense of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another, who claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his

hedges after he is forbidden, is guilty of manslaughter." 1 Hawkins P. C. (6th ed.), ch. 28, sec. 23, p. 108.

And certainly the same rule would apply to tearing down a rock fence as would apply to breaking a hedge. Wharton says: "We may here repeat that it is murder for A. to deliberately kill B. for merely trespassing on A.'s property, A. at the time knowing that only a mere trespass was intended. The same rule applies, *mutatis mutandis*, to the vindication of the right to personal property. If the killing of the trespasser in either case take place in the passion and heat of blood, the killing is manslaughter, but unless it be in resisting robbery, it is not justifiable. . . . On the other hand, when the defendant was not himself the aggressor, but was defending his own property from an assailant, he has a right to use as much force as is necessary to prevent its forcible illegal removal, or his exclusion from its use. It is true that when the wrong is slight, or can be otherwise prevented or redressed, a cool and deliberate killing of a trespasser is murder. But the question is mainly, Is an essential right of the party forcibly assailed? If so, he is entitled, in the absence of adequate legal remedy, to use such force as is necessary to repel the attack." 1 Whart. Cr. L. (9th ed.), secs. 500, 501.

These remarks of the learned author are fully supported by the case of *People v. Dann*, 53 Mich. 490. In that case an attempt was made to seize wheat in the defendant's custody; he resisted the attempted seizure, and emphasized that resistance with a loaded pistol. Being convicted of an assault with intent to murder Wilson, who attempted to seize the wheat and who also had a pistol, he appealed to the Supreme Court, and that court said: "Defendant was the owner and in possession of the farm, and Mrs. Layman of the wheat, and he acted for her in caring for it, and he had a right to defend this property against the encroachments by Wilson, and use so much force as was necessary for that purpose. It needs no citation of authorities to maintain this elementary principle of the law. A man is not obliged to abandon his farm, his home or his goods to a trespasser or intruder unless he voluntarily chooses so to do. . . . It further appears that, having this right to protect the property, the defendant, while in his efforts to assert and main-

tain it, was confronted by a concealed weapon used by Wilson against him, and in making his defense against this attack used his own pistol. This he had the right to do if he feared, and had good cause to fear, his life was in danger. . . . Upon the People's own showing in this case, had death resulted, the defendant would have been guilty of no more than manslaughter, and under all the circumstances a new trial would be necessary. The judgment of conviction must be reversed and the respondent discharged." See, also, 1 Whart. Cr. L., sec. 100; *Commonwealth v. Kennard*, 8 Pick. 133; *Commonwealth v. Power*, 7 Met. 596; *Beard v. United States*, 158 U. S. 550; 1 Hale, P. C. 485, 486; *People v. Payne*, 8 Cal. 341.

Bishop, when speaking of cases represented by *Commonwealth v. Drew*, 4 Mass. 391, says: "The doctrine that passion excited by trespass to property can never reduce the killing with a deadly weapon to manslaughter, is too hard for human nature; and though stated many times in the books, is not sufficiently founded in actual adjudication to be received without further examination. For surely, though a man is not so quickly excited by an attack on his property as on his person, and therefore the two cases are not on precisely the same foundation, yet since he has the right to defend his property by all means short of taking human life, if in the heat of passion arising in a lawful defense he seizes a deadly weapon and with it unfortunately kills the aggressor, every principle which in other cases dictates the reduction of the crime to the mitigated form requires the same in this case." 2 Bishop, New Cr. Law, note, sec. 706.

From these premises it should be concluded that instructions 15 and 23, given of the court's own motion, were erroneous. They are the following:

15. "Although you may believe from the evidence that deceased was removing a stone fence belonging to defendant at the time he was shot, that would not justify or excuse him" (defendant).

23. "The defendant had a right to arm himself and go to any part of his own premises and forbid trespass thereon, but, as before instructed, had no right to shoot deceased merely for removing stone defendant claimed to be his or on his premises."

The error in these instructions consists in this: that they do

not go far enough, and are therefore to that extent erroneous and misleading. Because while it was true that defendant was not *excused* or *justified* in shooting Morgan for taking away stone which inclosed defendant's field or which belonged to defendant, and were used by him to prevent his field from being flooded, yet it was also true that if hot blood was engendered in defendant by seeing his fence or wall thus removed, he was not guilty of a higher degree of offense than manslaughter in the fourth degree; and these instructions should have been enlarged so as to embrace that point. And it is not the law that self-defense may not co-exist with a right to have an instruction given, based upon manslaughter in the fourth degree.

Therefore judgment reversed and cause remanded. All concur.

NOTE (by H. C. G.).—*Another strong fence-defending case*, somewhat similar, is the late one of *Sims v. The State*, 38 Tex. Cr. R. 637, 44 S. W. Rep. 522 (1898). Sims managed a ranch for Clark adjacent to Foster's (deceased), and Clark or his grantors had built a fence there some years before. Lately, Foster claimed that the fence was on his land, of the use of which he was being deprived. He was told that if he thought the land was his, he ought to bring a suit at law for it; but he persisted in making threats that he would remove the fence. Clark wrote to Sims to firmly hold the fence. Foster sent men to dig post-holes on Clark's premises, and Sims ordered them away. A few days afterwards Foster came with three or four men to remove the fence, carrying a double-barreled shotgun. Sims advised Foster and his men to desist, telling them that he could not permit the removal of the fence. Foster ordered his men to tear down the fence, and, laying his shotgun in front of him, tackled the fence. Sims, having a pistol, shot him. The prosecutor sought to impair Clark's title by complications, and concessions by a grantee of Clark's, etc., all of which was held to be immaterial; but that, in any event, Clark was in actual possession, and was entitled to defend against even a grantee's aggressions, while that right existed, and Sims stood in his place; and further, Sims did not know of these complications. The court erroneously instructed the jury to consider the question of title as bearing upon defendant's *good faith*, etc.; and also that if defendant once abandoned his possession, he could not justify himself in slaying his adversary in defense of that possession, which was held to be outside of the case.

In reviewing the case the court said: "Appellant did not have to wait until his adversaries had gotten him in their power or placed him *hors du combat*. The only criterion which the law erects is, if he was not able to prevent them destroying his property and taking possession of his land by other means than slaying, he had a right to

slay. Now, what other means should he have resorted to? Not until he had entreated and protested without avail, and when his adversary, either with his shotgun then drawn and presented (according to the defendant's testimony), or within easy reach, began the work of destruction, coupled with the contemptuous remark, "You would not hurt a fly," did appellant undertake to act. Of course, if there were other means then present, of which he might have availed himself, to prevent the destruction of his property and the taking possession of his land, the law required him to adopt such means, and only in the contingency of his failure to resort to other reasonable means would he be amenable to the law. After a careful review of this testimony, it occurs to us that, if he had resorted to other means than that which was adopted by him, he would have given his adversary an undue advantage, and he would not only have failed in the protection of his property, but would have sacrificed his own life. The overt act had already been committed, and in the emergency he was authorized to act, both to prevent the destruction of his property and to save his own life."

PEOPLE V. SCOTT.

123 Cal. 434—56 Pac. Rep. 102.

Decided January 31, 1899.

SELF-DEFENSE: *Manslaughter — Challenge to jurors — Actual bias — Declining combat — Reasonable doubt — Instructions.*

1. A challenge to a trial juror in a criminal case for actual bias can only be reviewed upon appeal when the question presented is one of law; and the action of the trial court upon such challenge will not be reviewed where the question is one of fact, or of conflicting statements, or where the evidence would justify a finding either way. ["But because of the attendant difficulty, the judge should be *more careful* to see that the jurors *are in fact* unprejudiced and unbiased."]
2. An instruction to the effect that a defendant charged with murder cannot be acquitted upon his plea of self-defense unless the jury "believe," from the evidence, that at the time of firing the fatal shot the defendant honestly believed that his life was in danger, and that he was about to receive great bodily injury from the deceased, is erroneous, as eliminating the right of the defendant to an acquittal if the evidence created a reasonable doubt as to whether he acted in self-defense.
3. An instruction to the effect that if the deceased was the first aggressor, and had honestly and in good faith endeavored to decline further struggle before the fatal shot was fired, there was no self-defense, is erroneous in failing to recognize that the aggressor must make known his declination to his adversary.

Appeal from a judgment of the Superior Court of Kern County, and from an order denying a new trial; J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

J. W. Ahern, Ahern & Bennett, Laird & Packard, and *W. A. Harris*, for appellant.

W. F. Fitzgerald, Attorney-General, and *C. N. Post*, Deputy Attorney-General, for respondent.

HENSHAW, J. The defendant, informed against for the crime of murder, was convicted of manslaughter and appeals from the judgment and from the order denying him a new trial.

Objection is first made to the court's disallowance of challenges for actual bias, interposed by defendant to two of the jurors. While this court may review an order denying a challenge to a juror upon this ground, it may do so only when the question presented is one of law, over which questions alone this court in criminal cases has appellate jurisdiction under the constitution. A reading of the testimony taken upon *voir dire* discloses, as is usual, conflicting and contradictory statements by the jurors. They had formed opinions touching the guilt or innocence of the defendant. They would carry those opinions with them into the jury box. It would take evidence to remove them, nevertheless they could and would give to the defendant a fair and impartial trial. They could and would be governed by the law as delivered by the court, and by the evidence as received in court. It is the state of facts commonly presented where upon the question of bias the evidence would have justified a finding either way. Under such circumstances we are powerless to disturb the ruling of the trial court. *People v. Fredericks*, 106 Cal. 554. We recognize that with the increased facilities for the dissemination of news, it is far more difficult than formerly it was, to obtain a jury of men ignorant of the circumstances of the charge which they are called upon to try. But because of the attendant difficulty the judge should be the more careful to see that the jurors are in fact unprejudiced and unbiased, for it is as much a defendant's right to-day, to be tried by such a jury, as it was when Lord Coke delivered his now famous aphorism that a juror "should stand indifferent as

he stands unsworn." But, unless the testimony adduced upon *voir dire* is so clear upon the question of actual bias, that this court can say as matter of law that the juror is disqualified for that reason, we cannot disturb the ruling of the trial court.

Certain objections are urged to the court's rulings in admitting and rejecting evidence. We have examined them and are convinced after such examination that the rulings were not erroneous, nor to the prejudice of the defendant. But upon the instructions given, the court fell into errors which necessitates a reversal of the judgment.

The jury was instructed: "Before you can acquit the defendant upon the ground of self-defense you must believe from the evidence that at the time of the firing of the fatal shot (if you find that the fatal shot was fired by defendant) that the defendant honestly believed that his life was in danger and that he was about to receive great bodily injury from the deceased." By this the jury was instructed, that the defendant could not be acquitted upon his plea of self-defense, unless the jury believed from the evidence certain facts; but this eliminates to defendant's great disadvantage his right to an acquittal, if the evidence, even though the jurors did not believe it, yet created within their minds a reasonable doubt as to whether or not he had acted in self-defense. Even without the belief, if that doubt existed, the defendant was entitled to an acquittal.

Again, the court instructed the jury as follows: "If you believe from the evidence beyond a reasonable doubt, that the defendant and Charles Richards engaged in an altercation at or near Scott's tent, and that in said altercation the defendant was the aggressor, or even if you believe from said evidence that the deceased, Richards, was the aggressor; and if you further believe from said evidence beyond a reasonable doubt, that said Richards had honestly and in good faith endeavored to decline any further trouble before the fatal shot was fired, then I instruct you that the evidence shows no self-defense." This instruction, too, was erroneous and prejudicial to the defendant, in that it failed to recognize the proposition that the first aggressor must not only decline further strife, but must make known his declination to his adversary. See *People v. Button*, 106 Cal. 628; *People v. Hecker*, 109 Cal. 451.

We note no other alleged errors that call for a special consideration, but for the reasons given, the judgment and order are reversed and the cause remanded.

McFARLAND, J., and TEMPLE, J., concurred.

NOTE (by H. C. G.).—SELF-DEFENSE: In *Jones v. State*, 120 Ala. 383, 25 So. Rep. 25 (1899), the following clause appears: "The court in its oral charge said to the jury: 'Self-defense is the defense in seventy-five or perhaps eighty or ninety per cent. of the cases in this country.' This appears as an independent charge. In what connection with any other part of the oral charge it was given does not appear. Its logical and inevitable effect was to prejudice the minds of the jury against the defense the defendant was making to the charge against him, and it should not have been given."

Threats without overt acts.—It was held in *Wright v. State*, 40 Tex. Cr. Rep. 447, 50 S. W. Rep. 940 (1899), that defendant could not shield himself behind the claim that he feared the deceased, who had assaulted him and made violent threats, when at the time of the homicide the deceased was otherwise engaged, and made no demonstration against him, and did not seem to know that the defendant had approached him with a gun. Threats, to justify a reasonable apprehension of imminent danger, should be accompanied by overt acts of some kind, indicating an intention to execute the threats.

Voluntarily entering into a combat does not abrogate the right of self-defense; neither does express malice.—In *State v. Rapp*, 142 Mo. 443 (1898), on a trial for assault with intent, etc., it was held to be error to negative an ordinary instruction on self-defense by tacking onto it the condition that defendants should not have the benefit of it if the jury found that they "voluntarily entered into the difficulty."

And also error to instruct that, even though the prosecuting witness was the first to bring on the difficulty, yet, if the defendants "voluntarily" entered into it, they cannot be acquitted on the ground of self-defense, no matter how great and imminent the danger. The court observed that self-defense is an *affirmative, positive, intentional* act, and necessarily is *voluntary*. That "voluntarily entering into a difficulty" is not an ingredient in any case whatever. That if the right of self-defense existed, it was wholly immaterial whether its exercise was voluntary or involuntary. That existing the right, the *animus* was immaterial. That even though a defendant entertained the most express malice toward his assailant, yet, if the facts showed that he acted in self-defense to save his own life, his malice should not be taken into account. He has only exercised his legal right. (Citing 2 Bish. New Crim. Law, secs. 37 and 716; Whart. Crim. Law (9th ed.), sec. 98; *Golden v. State*, 25 Ga. 532; *Partlow's Case*, 90 Mo. 608; *State v. Gilmore*, 95 Mo. 554.)

Instructions on self-defense.—In the case of *McCrary v. State*, reported in 25 So. Rep. 671, the court instructed the jury as follows:

"(2) The court charges the jury, by the State, if they believe from

the evidence beyond a reasonable doubt that the defendant, *after* shooting deceased with his pistol, thereby disabling him, and while in no danger, real or apparent, of any harm at the hands of the deceased, he took a shotgun from the child of deceased, and pursued deceased and maliciously shot him, and after knocking him down with the gun, and while deceased was down, brained him with the gun, he is guilty of murder, and the jury should so find."

This instruction was held to be faulty for the reason that it assumed that the deceased was disabled by pistol shots fired by the defendant, and that thereafter the defendant could not avail himself of the doctrine of self-defense. But whether or not the deceased had been so disabled, was one of the questions to be determined by the jury.

The defendant requested that the following instructions be given, which were refused:

"The court instructs the jury that the law does not make actual or impending danger indispensable to the exercise of the right of self-defense, but that the law considers that, when threatened with danger, one is obliged to judge from appearances, and to determine therefrom as to the actual state of things surrounding him, and in such case, if one act from hurried consideration, induced by reasonable evidence, he will not be held responsible criminally for a mistake as to the extent of the actual danger; but if the jury believe from the evidence that, at the time of the shooting, the conduct of the deceased was such as to excite in the mind of a reasonably prudent man the belief that the deceased then had the means and purposed then to kill the defendant, or to do him great bodily harm, he was justified in anticipating the attack, if it was present, urgent, and otherwise unavoidable, except by flight, and protecting his own life or limb by taking the life of his adversary, even though the jury, in the light of subsequent developments, may believe that the danger was not real, but only apparent; and if the jury so believe, it is their duty to acquit." "The court charges the jury that, in passing upon the action of the accused, the jury should not try him by the light of after-developments, nor hold him to the same cool and correct judgment which they are able to form. They should put themselves in his place, and judge of his act by the facts and circumstances by which he was surrounded."

The court thought that the defendant was entitled to have the views expressed in these instructions presented to the jury and, for the action of the trial court on these three instructions, reversed the case.

The right of self-defense should not be limited by the ability of the defendant to distinguish between felonies and misdemeanors.—We had prepared *State v. Sloan*, 22 Mont. 293, 56 Pac. Rep. 364 (March, 1899), but owing to lack of space we are obliged to omit it. The most salient feature in that case arose over an instruction given to the effect that, although the defendant had got into a quarrel and was assaulted by the deceased, still he was not justified in using a deadly weapon unless he had good reason to believe that there was imminent danger that the deceased would kill him or inflict on him some great bodily injury amounting to a felony. This was held to be erroneous, the court say-

ing that: "The right of one assaulted to kill his assailant in self-defense should not be limited by his ability to distinguish between felonies and misdemeanors. He must be guided by a reasonable apprehension of death or great bodily harm. And the fear or apprehension of this latter, from an unlawful beating at the hands of the assailant, may be sufficient, even when the assault is lacking in some of the elements of felony."

Passion and malice are antagonistic elements.—The court, in substance, instructed that, though the killing was done in a quarrel when defendant's passions were aroused, yet, if malice were present in his mind, the jury must determine whether the "killing was prompted principally by such passion or by such malice," and thus decide whether the offense was manslaughter or murder. The court said: "There can be no such thing as a killing with malice, and also upon the *furor brevis* of passion; and provocation affords no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot co-exist;" and argues at length that the irresistible passion, aroused by adequate provocation, necessary to reduce the killing to manslaughter, rebuts the idea of malice. *Id.*

EVANS v. STATE.

106 Ga. 519—32 S. E. Rep. 659, 71 Am. St. Rep. 276.

Decided March 4, 1899.

SELF-INCRIMINATION: *Illegal methods used to force defendant to produce evidence against himself—Such evidence is incompetent.*

Following the decision of this court in the case of *Day v. State*, 63 Ga. 667, the evidence which was offered by the State, and admitted, showing that the accused, while not under legal arrest, had been compelled to put his hand in his pocket and surrender a pistol, thus disclosing that he was violating the law, was not admissible on the trial of such person for the offense of carrying concealed weapons, alleged to have been committed on that occasion.

(Syllabus by the Court.)

Plaintiff in error, convicted of carrying concealed weapons in the City Court of Hall County, Hon. G. H. Prior, Judge, brings error. Reversed.

H. H. Dean, for the plaintiff in error.

Howard Thompson, Solicitor-General, for the State.

Conn, J. Evans was convicted of the offense of carrying concealed weapons. His motion for a new trial was overruled, and he excepted.

The only witness introduced on the trial of the case was Brown, a policeman, who testified that he was called up at night in Gainesville, Hall county, on account of some disturbance. When he got to the place where the disturbance was alleged to have occurred, he saw nobody, but was told that the accused had been shooting around there. After a while he saw the accused coming down the road. At this point the witness was allowed to testify as follows: "I told him to give up his pistol, and he said, 'What pistol?' and I said, 'The one you have been shooting with.' He refused to give it up, but I called Mr. Lyles, another policeman, and we forced him to give it up. He had it in his hand, under his coat, and it was concealed so I could not see it until after I compelled him to give it up." After this, witness arrested the accused. He had no warrant for the accused; and neither had Lyles, the other policeman. That part of the testimony of the witness which is quoted above was objected to by the accused on the ground that "no party can be compelled to give evidence against himself by act or words." The refusal of the court to exclude this evidence is assigned as error in the motion for a new trial.

The constitution of this State provides that "no person shall be compelled to give testimony tending in any manner to criminate himself." Civil Code, § 5703. In the case of *Day v. State*, 63 Ga. 667, it was held that: "Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible. A defendant cannot be compelled to criminate himself by acts or words." In that case, Allen, a witness for the State, testified that: "Witness took hold of [the accused], and pulled him along, and then he put his foot in the track. The first time witness told him to put his foot in the track, defendant refused. Witness then took hold of his foot and put it in the track. He did not consent to it. The shoe fitted the track." This evidence was admitted over the objection of the accused that it was compelling him to furnish evidence against himself, contrary to the constitution of the State. Chief Justice Warner,

after quoting the constitutional provision above set out, added: "Nor can one, by force, compel another, against his consent, to put his foot in a shoe track, for the purpose of using it as evidence against him on the criminal side of the court,—the more especially when the person using such force has no lawful warrant or authority for doing so." It will thus be seen that in the case cited the constitutional provision was construed to apply to cases other than those in which the accused was forced to give evidence against himself, either in court, or pursuant to an order of court. In the present case, neither the officer who testified nor the officer who assisted in the arrest had any warrant for the accused, nor was any arrest made until after the accused was forced to give up his pistol. The only fair interpretation that can be given to the evidence objected to is that the accused was compelled, against his consent, to put his hand in his pocket, and surrender his pistol to the officers, and thus disclose that he was guilty of a violation of law. Viewing the case in this light, we think it is controlled by the decision in the *Day Case*, and that the court erred in admitting the evidence objected to. We have made a careful examination of the decisions of this court bearing upon this question, and find none which, properly construed, conflicts with the ruling here made.

The case of *Franklin v. State*, 69 Ga. 36, differs from the present case in three important respects: (1) The accused was under legal arrest; (2) he did not object to furnishing the incriminating evidence; and (3) he remained passive while shoes, which were afterwards used as evidence of his guilt, were pulled from his feet by others. Chief Justice Jackson, in his opinion in that case, in distinguishing it from the *Day Case*, makes use of this language: "It was that which he wore which witnessed against him, and not any act he did under coercion, such as being forced to put his feet in tracks somebody had made." While the headnote in the case of *Drake v. State*, 75 Ga. 413, restricts the application of the constitutional provision above quoted to persons sworn as witnesses in a case, an examination of the facts appearing of record in that case will show that it is really not in conflict with the *Day Case*, or the ruling made in the present case. While it appears that part of the clothing introduced in evidence was taken off of the person of the accused,

he was at the time in legal custody; and no objection, so far as the record discloses, was made by him. *Woolfolk's Case*, 81 Ga. 551, 8 S. E. Rep. 724, is to be distinguished from the *Day Case* for the same reasons as the case last cited. In the *Myers Case*, 97 Ga. 76, 25 S. E. Rep. 252, the accused was not forced against his will to furnish evidence against himself. In discussing this question, Atkinson, J., recognizes the distinction laid down by Chief Justice Jackson in the *Franklin Case*, *supra*, in the quotation above set out. Besides, Myers was under arrest, and it does not appear whether the shoes introduced in evidence were taken from his feet, or whether, if this was done, he raised any objection thereto. In the case of *Williams v. State*, 100 Ga. 511, 28 S. E. Rep. 624, no such question as the one now under discussion was raised or decided. In that case an officer took from the person of the accused marked coins, which were afterwards used in evidence against her. She was not compelled to furnish any evidence whatever against herself. The decision in that case simply holds that the constitutional provision as to unreasonable searches and seizures did not render the evidence inadmissible. It was there said that the purpose of the constitutional provision was to deter the lawmaking power from authorizing or declaring lawful any unreasonable search or seizure, and to prevent courts and executives from enforcing any law which was violative of this provision, but that it was not intended to operate so as to prevent the courts from receiving evidences of crime, although they might have been obtained by an illegal and unreasonable search and seizure. It would seem from these cases that the law in this State is that evidence of guilt found upon a person under legal arrest may be used in evidence against him, but that, where a person not in legal custody is compelled to furnish incriminating evidence against himself, the evidence is not admissible. The ruling made in the *Day Case* constrains us to reverse the judgment of the court below in refusing a new trial, on the ground that the evidence complained of was improperly admitted. Judgment reversed. All the justices concurring.

NOTES (by J. F. G.).—Another very interesting Georgia case, where authorities are reviewed, is *Blackwell v. State*, 67 Ga. 76, 4 Am. Crim. Rep. 183. In that case a conviction for murder was reversed because

the court had directed the defendant to stand up in the presence of the jury and a witness, thereby showing that his right leg was amputated below the knee. The witness had testified as to certain tracks and impressions made on the ground near the place of the homicide, in which appeared the impression of the left foot of a man with the appearance as though he was upon the knee of his other leg.

In *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72, a conviction was reversed because the prosecuting attorney brought a pan of mud into the court and placed it in the presence of the jury; and, having proved that the mud was about as soft as that where tracks were found, requested the prisoner to place his foot in the pan of mud. The trial judge having instructed the prisoner that he could comply or not, as he pleased, he refused; and the judge instructed the jury that this should not be taken against him. The conduct of the prosecuting attorney was regarded as sufficiently prejudicial to cause a reversal, notwithstanding the instruction of the judge.

In *State v. Jacobs*, 5 Jones (50 N. C.), 259, it was held error for a trial judge to compel a defendant to exhibit himself for inspection by the jury to enable them to determine his status as a free negro.

Privilege of witnesses.—In *Neale v. Cunningham*, 1 Cranch, C. C. 76, which was an action for damages because of a false imprisonment, the constable who served the *ca. sa.* was called as a witness, and he objected to being sworn, because his testimony, if material in the case, might tend to criminate him. It was held by two of the presiding judges that he was exempt from taking the oath as a witness; but the third judge claimed that he ought to take the oath, and could only object to answering questions tending to criminate him. Where, as in that case, the cause of action is based upon a proceeding claimed to be criminal in its nature, it would seem that a witness, such as the constable who made the arrest, should be privileged from taking the oath; for any matter that he might testify to might tend to establish a cause of action, and supply a missing link, thereby subjecting him to a future prosecution.

In *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. Rep. 781, the court below refused to compel the defendants to produce certain books and documents, and to answer certain questions, for the avowed purpose of proving that the defendants had cornered the market as alleged, etc. This ruling was affirmed by the Supreme Court, that court holding that a witness need not answer any question that would tend to, or furnish a link in a chain of evidence to, criminate himself, unless it is not only shown that the statute of limitation bars the prosecution for the alleged crime, but that there is no prosecution pending therefor.

In *Samuel v. People*, 164 Ill. 379, 45 N. E. Rep. 728, it was held that the witness, who had verified the information against the defendant, still retained his right to decline to testify against the defendant, on the ground that such testimony might criminate the witness; but in that case, the objection being overruled, and the witness having testified, it was held that the defendant should not take advantage of the ruling, in that it was a personal privilege possessed alone by the witness.

In *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. Rep. 195, it was held that even an act of Congress declaring that such evidence could not be used against the witness in a future prosecution would not deprive the witness of his privilege; the statute not granting to him entire immunity from prosecution.

In *United States v. Collins*, 1 Wood, 499 (510), a challenge was made to the grand jury panel, and the United States marshal was called as a witness to prove the manner in which the grand jury was summoned. He declined to testify, because, if the grand jury was irregularly impaneled, he was liable to a penalty. This objection was sustained.

The case of *Miskimins v. Shaver* (Sheriff), 8 Wyo. 392, 58 Pac. Rep. 411, 49 L. R. A. 831, gives a lengthy review of this subject. The relator, who was committed for refusing to answer certain questions, was released upon writ of *habeas corpus*. One judge dissented, and filed a lengthy dissenting opinion.

Upon this subject, see also *People v. McCoy*, 45 How. Pr. 216; *People v. Wolcott*, 51 Mich. 612; *People v. Mead*, 50 Mich. 278; *Ex parte Senior*, 32 L. R. A. 123; *Ex parte Gould*, 21 L. R. A. 751; *Rice v. Rice*, 47 N. J. L. 559, 11 L. R. A. 591; *State ex rel. v. Simmons Hardware Co.*, 15 L. R. A. 676; *Re Buskett*, 14 L. R. A. 407; *Kendrick v. Commonwealth*, 78 Va. 493; *Cullen v. Commonwealth*, 24 Gratt. 624; *State v. Nowell*, 58 N. H. 314; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; *United States v. James*, 60 Fed. Rep. 257, 26 L. R. A. 418; *Galbreath v. Eichelberger*, 3 Yeates, 515; *Republic v. Gibbs*, 3 Yeates, 429; *Horstman v. Kaufman*, 97 Pa. St. 147; *N. W. Bank v. Nelson*, 1 Gratt. 110; *Alabaster v. Hamer*, 70 Law Rep., Law Times, 375; *Reg. v. Hassett*, 8 Cox, C. C. 511.

PEOPLE V. FITZGERALD.

156 N. Y. 253—50 N. E. Rep. 846.

Decided June 7, 1898.

TRIAL: Arson—Circumstantial evidence—Presumptions—Motive—General character—Particular acts of misconduct—Other similar offenses—Derogatory letters from superiors—Cross-examination—Instructions and remarks.

1. Where a conviction is sought upon circumstantial evidence, the circumstances must be established by proof, not inferentially, and must all be consistent with and point to guilt, and *must be inconsistent* with innocence.
2. Proof of motive or inducement to the criminal act is resorted to for the purpose of explaining evidence which might otherwise remain in doubt. The motive cannot be based upon imagination any more than any other fact, but must be based upon evidence.

While it is proper to prove a motive, it must have some logical and legal relation to the criminal act charged.

3. The defendant was charged with the specific offense of burning, or causing to be burned, a parochial school building, belonging to a religious corporation of which he was trustee, pastor and manager, the assumed motive being to collect the insurance thereon, out of which to pay himself the salary in arrears, which was due him; and it was not to be expected that on trial he would be able to explain or rebut an array of circumstances put in evidence, covering a variety of other charges, of improper acts and moral delinquencies, and exhibitions of an unjust and arbitrary disposition, nor to explain charges of other burnings, unless they were well established and had a direct bearing on the issue being tried.
4. It was error to admit evidence that other property of the corporation had been burned more than two years previous and that the insurance company had persisted in canceling the policies taken out by defendant, the origin of such fires not being shown. Also error to refuse to instruct the jury that such evidence should not be considered, and in remarking that "There is a proper and lawful purpose for which the jury may consider those fires."
5. (2, 3, 6) It was error to admit in evidence circumstances tending to show that defendant had once assaulted his female servant; to admit a letter to defendant from his bishop containing statements derogatory to the conduct of defendant; also evidence tending to show that defendant was unjust, arbitrary and unreasonable in his conduct toward those under his control.
6. (4) It was error to refuse to instruct that the presumption of law is that the defendant would not misappropriate the money of the corporation, etc.; and error to charge that "There is no such rebuttable presumption that I know of," etc.
7. (5) It was error to qualify an instruction on the failure of the defendant to testify, by telling the jury that while the statute provides that no presumption should be indulged in against a defendant because of his not testifying, the statute does not say "that the jury shall consider all of the evidence as denied by him, which he *might deny* if he took the stand," etc.
8. (7) Defendant was not allowed to ask, on cross-examination, an attorney to whom he had given the insurance policy for collection, whether he (defendant) had not told him to pay the money to the bishop, when collected. This question related to the very transaction about which the witness had testified, and an answer to it might have tended to rebut or dispel the theory of a criminal motive in the defendant, which the prosecution contended was an essential element of the case. The question was proper, and the ruling thereon erroneous.

Appeal by John M. Fitzgerald from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, affirming a judgment of the Monroe County Court

convicting him of the crime of arson in the second degree, and an order denying a new trial. Reversed.

(*People v. Fitzgerald*, 20 App. Div. 139.)

David N. Salisbury, for the appellant.

George D. Forsythe, for the respondent.

O'BRIEN, J. The defendant was indicted for the crime of arson in the first degree, convicted of arson in the second degree, and sentenced to imprisonment in the State prison for the term of ten years. The specific charge in the indictment was that on the 17th day of July, 1895, he set fire in the night and burned the parochial school house in the village of Charlotte, in which building there was at the time a human being. The building was the property of a religious corporation, and the defendant, as the pastor of the parish church with which the school was connected, was one of the five trustees who had charge of the corporate property and the management of the temporal affairs of the congregation. In this capacity as trustee he had procured the building to be insured to an amount fully equal to, if not in excess of, the actual value; the loss, if any, being payable by the terms of the policies to the corporation by its corporate name.

It is not claimed that the defendant actually or personally set the fire. Indeed, it is admitted on all sides that on the night when the fire took place he was absent from the scene of the crime, and could not have personally participated in it. The theory of the prosecution is that the fire was set by one John Cronin, and it incidentally appears in the record that he was convicted of the crime, but that the defendant procured him to do the criminal act. Cronin was the servant of the religious corporation, employed by the defendant in his capacity as trustee, to have the care of the church, school house, parochial residence, in which the defendant resided, and other corporate property as janitor. Practically the relations between the defendant and Cronin were those of master and servant, since the latter was, in the discharge of his duties, subject to the directions of the former, and to a very great extent, if not wholly, under his control. It appears that Nora Cronin, a sister of John, was a domestic in the defendant's house, and the claim is that the

defendant, through her, procured John to burn the school house. In the criminal law a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission, whether present or absent, and a person who, directly or indirectly, counsels, commands, induces, or procures another to commit a crime, is a principal. Penal Code, § 29. The issue presented for trial was, therefore, very clear and distinct. It was whether the defendant in fact did, either directly or indirectly, counsel, command, induce, or procure John Cronin to commit the offense charged in the indictment. It is not claimed that there was any direct proof that he did. It was competent for the People, however, to prove the charge by circumstantial evidence, and they attempted to sustain the case wholly by evidence of that character.

The People had the burden of proof, and a great variety of facts and circumstances were shown, all tending, as is claimed, to prove the main fact which was in issue. If the case was otherwise free from error, and the sole question was whether there was sufficient proof to warrant the submission of the case to the jury, we would, I think, feel concluded by the verdict with respect to the question of fact involved. But it is not every fact or circumstance from which an ingenious or imaginative mind may infer by some process of reasoning the existence of the main fact in issue that the law admits as possessing the force and certainty of evidence. In attempting to prove a fact by circumstantial evidence there are certain rules to be observed that reason and experience have found essential to the discovery of truth and the protection of innocence. The circumstances themselves must be established by direct proof, and not left to rest upon inferences. The inference which is to be based upon the facts and circumstances so proved must be a clear and strong logical inference, an open and visible connection between the facts found and the proposition to be proved. When a criminal charge is sought to be sustained wholly by circumstantial evidence, the hypothesis of guilt or delinquency should flow naturally from the facts and circumstances proved, and be consistent with them all. The evidence of facts and circumstances must be such as to exclude to a moral certainty every hypothesis but that of guilt of the offense imputed; or, in other words, the facts

and circumstances must all be consistent with and point to the guilt of the accused not only, but they must be inconsistent with his innocence. In the investigation of all charges of crime it is competent to prove a motive on the part of the accused for the commission of the criminal act. Motive is an inducement, or that which leads or tempts the mind to indulge the criminal act. It is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act which has been clearly proved, but for the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt. With motives, in any speculative sense, neither the law nor the tribunal which administers it has any concern. It is in cases of proof by circumstantial evidence that the motive often becomes not only material, but controlling, and in such cases the facts from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case. *People v. Bennett*, 49 N. Y. 137; *People v. Owens*, 148 N. Y. 648, 43 N. E. Rep. 71; 1 Greenl. Ev., § 13.

The motive attributed to the accused in any case must have some legal or logical relation to the criminal act according to known rules and principles of human conduct. If it has not such relation, or if it points in one direction as well as in the other, it cannot be considered a legitimate part of the proof.

In this case the People claim that the defendant had a motive in procuring the building to be destroyed, and that was that the church corporation owning it was indebted to him for arrears of salary, and that his purpose was to get possession of the insurance in order to apply it on the salary claimed. The defendant was the treasurer of the corporation, and the motive supposed involved a wrongful appropriation of the money, and the acquiescence of the other officers and trustees, either actively or passively, in the scheme. Whether such a motive is a legitimate inference from the facts or a remote speculation we will not now inquire. Such a motive does not, in the ordinary course of things, inhere in the relations of debtor and creditor. The chances of the creditor being able to reach the money when payable to the debtor himself are so precarious, uncertain, and remote that, ordinarily, a motive to destroy the property insured

cannot be attributed to the former. It may be that in this case the defendant's relations to the corporation to which the money was payable, and his control over its action, were such as to justify the imputation. Much evidence was given to show that the debt either existed or was claimed by the defendant, and the character of the proof on this point was such that the jury could draw inferences from it quite damaging and injurious to the defendant's general character and conduct in other respects. If, however, it tended to prove a motive for the commission of the offense charged, it was none the less admissible because it tended also to prove that the defendant may have been guilty of some other crime or moral delinquency. The case was evidently tried upon the principles of the *McKane Case*, 143 N. Y. 455, 38 N. E. Rep. 950. There can be no doubt, I think, that the courts went quite far enough in that case in sanctioning evidence tending to prove other offenses against the accused than the one charged. But, although they were quite injurious to the accused, they had some bearing on the main point in issue, and this court was careful to point out the difficulty which a person charged with a specific offense has to meet upon such a trial with a multitude of inculpatory facts claimed to be relevant to the main issue. We observe now, as we did then, that "there is always danger in such cases that the specific charge will be lost sight of and disappear in the mass of collateral facts growing out of other subjects, and that the defendant may be convicted because of other wrongdoing with which he was not charged." P. 475, 143 N. Y., and p. 956, 38 N. E. Rep. Any departure from the real issue in the case to investigate other transactions tends to divert the minds of the jury from the real question before them, and to prejudice the accused.

The defendant was required in this case to answer a specific charge, and that was whether he had instigated or procured, directly or indirectly, the building in question to be burned. He was not expected to be able to answer or to explain all the other faults and delinquencies of his life, and hence past transactions involving the suspicion of other possible wrongdoing, or acts from which inferences of moral turpitude might be drawn, should have been excluded, unless it can be shown that they had some bearing on the main fact to be proved. His moral char-

acter was not involved in the inquiry, since he did not make it a subject for debate himself, or testify in his own behalf. The rule that an accused party may resort to affirmative proof of good character in order to repel the presumption of guilt raised by the evidence, while the prosecution is not permitted to resort to proof of bad character in order to overcome the legal presumption of innocence, is founded upon the benign principles that underlie the criminal law, and is in harmony with that presumption against crime with which every investigation of a criminal charge must begin. And, however natural it may be for the common mind to reason that a person who has committed, or is suspected of having committed, one offense, is likely to commit another, and, therefore, be guilty of the one charged, yet the law refuses to recognize it as a fact or circumstance tending to establish the specific charge or to allow the accused to be prejudiced in that way with the jury. The principles of the law of evidence that govern all criminal trials are, as Lord Erskine once observed, "founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." 24 Howell's St. Tr. 966.

The record in this case discloses numerous decisions and rulings made at the trial with respect to the admission and exclusion of testimony, and in the charge of the court, which we think were erroneous and prejudicial to the defendant. We will not attempt to deal with all the questions raised and discussed by his counsel, but only such as appear to us to be the most prominent.

(1) The People were permitted, against the defendant's objection and exception, to prove that more than two years prior to the burning of the school house other property of the church corporation, covered by insurance, had been burned; also some of the defendant's private property; and that as a consequence the agents of the insurance company insisted upon canceling policies upon other property which the defendant had procured to be written. There was much evidence of that character offered and received, but the real origin of the former fires was left to conjecture. The defendant's counsel requested the court to instruct the jury that there was no evidence in the case to show that any of the previous fires were of incendiary origin,

and that the jury should not consider them as evidence in the case. To this request the learned trial judge replied: "I do not see anything wrong in that request, and I so charge the jury, omitting the latter fact. That the jury should not consider any of these alleged fires is hardly proper. There is a proper and lawful purpose for which the jury may consider those fires." The defendant's counsel excepted to these remarks. It is quite evident that the defendant's case was in a worse condition after the request than it was before, although the learned judge admitted that he could see nothing wrong in the request. The jury were plainly told that they could consider the evidence for some purpose which was not stated. We have already shown that this evidence which tended to create a suspicion in the minds of the jury that the defendant may have been connected with other offenses of the same character as the one charged was not admissible. There was no legal connection shown between the former fires and that charged in the indictment. There was no legitimate purpose for which the jury could consider the evidence, and as it was in the case, whether with or without objection, the request was proper, and should have been charged.

(2) The People called two witnesses, who testified that in the month of November—some four months after the fire in question—they were attracted by noise in the defendant's house; that they heard the sound of his voice and the screams of a woman that they supposed to be Nora Cronin; also the breaking of china, and then the fall of some heavy body on the floor. In a short time after, the defendant came to the kitchen door, without his hat. The testimony was received against the defendant's objection and exception. There was only one inference from the testimony, and that was that the defendant was guilty, on the occasion testified to by the witnesses, of inflicting physical violence upon a woman who was a servant in his household. If that fact was a reasonable conclusion from the circumstances, it is quite difficult to see what bearing it had upon the issues in the case. The learned district attorney reasons that, inasmuch as this woman submitted to physical violence at the hands of the defendant, it must follow that she would be likely, through fear or some other influence, to become an instrument in the execution of his purpose to commit the offense for which he was

on trial. We do not think that the inference naturally proceeds from the fact sought to be proved. Indeed, a conclusion quite the contrary might be drawn with as much reason from the circumstances, since it could be said with at least as much force that the defendant had never trusted such a dangerous secret to one to whom he had given so much cause for resentment, and who would be likely to seek for opportunities of revenge. The truth is that the circumstance had no bearing on the case one way or the other, and, since it presented the defendant to the jury in a very unfavorable light with respect to a transaction foreign to the issue, should have been excluded. The fact, if true, that the defendant was in the habit of inflicting castigation upon a domestic under such circumstances plainly tended to create prejudice against him with the jury.

(3) The bishop of the diocese, who was the defendant's official superior in the church, was called as a witness by the prosecution, and produced a letter which he had written to the defendant under date of July 11, 1895, which the district attorney gave in evidence under objection and exception of defendant's counsel. The body of the letter is in the following words: "Of late so many complaints have come to me of your repeated and public drunkenness that I cannot close my eyes any longer to your conduct. I now give you warning that if you do not quit the use of intoxicating drinks altogether, and reform your life, I shall be obliged to send you to a house of correction, and remove you from the charge of souls. Your usefulness in your present mission is at an end, and the sooner you seek some other field of work the better it will be for yourself and for religion." It cannot be doubted that this letter, coming from such a source, must have had great weight and influence with the jury. It was the opinion of the bishop, deliberately formed, with respect to the defendant's life and general conduct. It was clearly prejudicial to the defendant, and should have been excluded, unless it proved some fact material to the issue before the jury. The learned district attorney defends the decision under which it was put into the case on the ground that, since it brought home to the defendant knowledge of his relations to the bishop and the church, and pointed to his removal from the charge of the parish, it was admissible on the question of motive. The motive attrib-

uted to the defendant was, as we have seen, the desire to possess himself of the money represented by the policies of insurance. One of these policies, for \$1,500, was issued more than two years before the fire. Three more were issued for \$4,900 in the aggregate, on July 10, 1895, seven days before the fire. The defendant, when he procured these last policies, must have conceived the design to destroy the building, if at all, and hence a letter subsequently written by the bishop and received by the defendant could not have influenced his design either in the conception or execution. It is not conceivable that he supposed the threat of sending him to a house of correction could be executed against his will; and, if the threat of removal had any influence at all upon his mind, he could scarcely expect that it would be delayed so long as to enable him to procure the money. The policies would not fall due until sixty days after proofs of loss, and there might be further delay and litigation before payment. The local agents of the companies were not his friends. The bishop himself was one of the trustees of the corporation, with power to interfere at any time to prevent the diversion of the money to the defendant by notice to the companies, as in fact he did after the fire. The theory that this letter furnished the motive for the commission of the crime charged is purely speculative. The reasoning from cause to effect is strained, if not entirely fallacious, and it cannot be accepted in law as a justification for the admission of evidence of such a damaging character to the defendant when it was foreign to the issue. It had no tendency to throw light on the real question of fact involved in the case, and could only prejudice and mislead the jury.

(4) The theory of the prosecution that the defendant had a motive to procure the building to be destroyed in order to reach the money dominates the whole case, and he had the right to have the jury properly instructed upon that branch of the case. The defendant's counsel requested the court to charge the jury that the presumption of law is that the defendant would not steal or misappropriate any money of his church society had it got into his hands. In response to such request the court said: "There is no such rebuttable presumption of law that I know of. The law, on the contrary, supposes that men will sometimes misappropriate, and for that reason statutes are enacted for the

punishment of grand larceny. I do not think it can be said that there is a presumption of law that men will not do wrong; there is a presumption of law that men are innocent until their guilt is established." To the refusal to charge as requested and to the charge as made there was an exception. We think the exception presents a material legal error. The learned judge was not requested to charge that the presumption referred to, or any other presumption in the case, was of such a character as to be conclusive. The request expressed a correct legal principle, applicable to the case, and the charge as made could scarcely fail to impress the jury with the idea that it was their duty to assume, in their deliberations, the existence of a principle just the contrary.

(5) It appeared incidentally in the case that the defendant appeared before the grand jury as a witness. That body was engaged in the investigation of the charge against the Cronins and John Doe. The court was requested by the defendant's counsel to instruct the jury that his failure to testify at the trial in his own behalf did not create a presumption against him and the court thereupon proceeded to charge as follows: "I have been requested to charge you, gentlemen, that the fact that the defendant went voluntarily before the grand jury, and told his story, but has not taken the witness stand here, should not raise any presumption against him. That is true, gentlemen. The defendant had a right to go before the grand jury, and make his statement there, and he had a right to change his mind, and not take the stand here in this action, and the law says that no presumption shall attach to his failure to take the stand on his trial. That statute does not say, however, that the jury shall consider all of the evidence as denied by him, which he might deny if he took the stand. It does not incorporate in the evidence a denial which is not there. It simply says that the jury shall consider the evidence as it is, not strengthened or weakened by the fact that the defendant does not take the stand. It does not say that the evidence shall be the same as if it contained a denial by him; it does not say that the jury shall presume that the defendant would deny all the incriminating facts if he took the stand. It says that the jury are not to presume

that he would deny or admit any of the evidence, but that the jury must consider the evidence as it stands, unaffected by the fact that the defendant does not take the stand." To this portion of the charge the defendant duly excepted. In the trial of a criminal case it can never be necessary to add anything to the plain and simple language of the statute on this subject. The fact that the accused does not testify in his own behalf cannot be permitted to create any presumption against him. That is the plain mandate of the law, and the force of the proposition should not be weakened and destroyed with the jury by qualifying words. The learned judge, in contrasting the case as it was with the case as it would have been if the defendant had taken the stand, must have left the impression on the minds of the jury that, after all, something was to be taken against the defendant by reason of his omission to testify, and therefore this part of the charge was open to objection.

(6) The school that was conducted in the building in question was under the charge of the sisters of charity, and three or four of these ladies were called as witnesses for the People. While they all testified with a prudent caution and in guarded language, it is plain that their relations with the defendant were strained. Their testimony, much of which was received under objection and exception, presented the defendant to the jury as a clergyman, supposed to be engaged with them in a common work, but who was rude in his behavior, arbitrary and unreasonable in the exercise of power, regardless of their just rights and feelings and of the success of the work in which they were engaged. All this may be true, but it had no bearing on the real issue in the case, and, since it tended to excite prejudice against the defendant, should, we think, have been excluded. The learned district attorney defends the ruling under which this class of testimony was admitted on the same ground as the letter of the bishop already referred to. The testimony is of the same general character, and points in the same direction. In one case the opinion of the bishop with reference to the defendant's life and general conduct was placed before the jury; in the other the opinions of the sisters of charity. These opinions, whether right or wrong, were not evidence against the defendant. It

was, of course, competent for the People to prove by these witnesses any material fact, and so far as the testimony related to the use and character of the building, the time when the school closed, and the person who had general charge at night, it was admissible. But the specific acts and interviews of the parties, reflecting upon the defendant's general conduct, were irrelevant. It would have been quite as competent for the People to call witnesses to prove the defendant's general bad character. That was virtually what was accomplished by the proof of many of the collateral facts and specific acts and transactions in which the case abounds. If they had any legal relation to the criminal act charged, it would then be the defendant's misfortune, due entirely to his own disregard of the moral code. But, since they had no legitimate bearing on the fact in issue, within the rules of law to which we have referred, the People had no right to prove indirectly what they could not have been permitted to show by direct proof, and that was the plain tendency of the evidence.

(7) The People called as a witness one of the members of a law firm with whom the defendant left the insurance policies for collection after the fire, and proved that fact and the various steps taken to collect the loss. The testimony tended to sustain the theory of the prosecution that the purpose of the defendant was to possess himself of the insurance money. On cross-examination the defendant's counsel asked the witness if it was not the fact that the defendant, when he left the policies in his hands for collection, requested that the money which should be collected on them should be paid over to the bishop. The question was objected to by the People, and excluded under exception. The question related to the very transaction that the witness had described, and had a plain tendency to explain or modify it. The defendant had a right to repel the inference which the jury were asked to draw from the fact that he had delivered the policies to the firm for collection, and hence the question was proper, and the ruling excluding it error.

There are other questions in the case which, if they stood alone, could not well be overlooked; but, since they may not arise on another trial, it is unnecessary to prolong the discussion.

The judgment should be reversed, and the case remanded for a new trial.

All concur. Judgment reversed, etc.

NOTE.—*Improper cross-examination as to whether a defendant on trial had been disbarred, expelled from a church, etc.*—On the same line as the foregoing case is *People v. Dorothy*, by the same court, in the same year, 156 N. Y. 237, 50 N. E. Rep. 800. Defendant was an attorney at law, and was convicted of stealing the money of a client. The trial court permitted him to be cross-examined as to his being expelled from the Baptist church, and what communications he addressed to the church; and also to explain on what ground a disbarment proceeding against him was based, covering various specifications of different charges.

It was held that whether or not he had been expelled from a church was wholly irrelevant to the issue, and the prosecution had no right to cross-examine him as to such matters; and that it was gross error to permit cross-examination of him as to the particular charges in the disbarment proceedings. Also a letter was received in evidence written to the prosecuting witness by an attorney somewhat connected with proceedings concerning the transactions out of which the prosecution arose, expressing opinions derogatory to the defendant's integrity. This was held to be prejudicial error.

PEOPLE v. TUPPER.

122 Cal. 424—55 Pac. Rep. 125.

Decided November 26, 1898.

TRIAL: *Due process of law—Temporary absence of the judge.*

For the presiding judge, during the argument on a trial for felony, to absent himself from the court room for twenty minutes out of sight and hearing of the proceedings, is to try the accused without due process of law.

Appeal from Superior Court of Los Angeles County; Hon. B. N. Smith, Judge.

Colonel L. Tupper, convicted of felony, appeals. Reversed.

Bernard L. Mills, for the appellant.

W. F. Fitzgerald, Atty. Gen., and *Charles H. Jackson*, Dept. Atty. Gen., for the People.

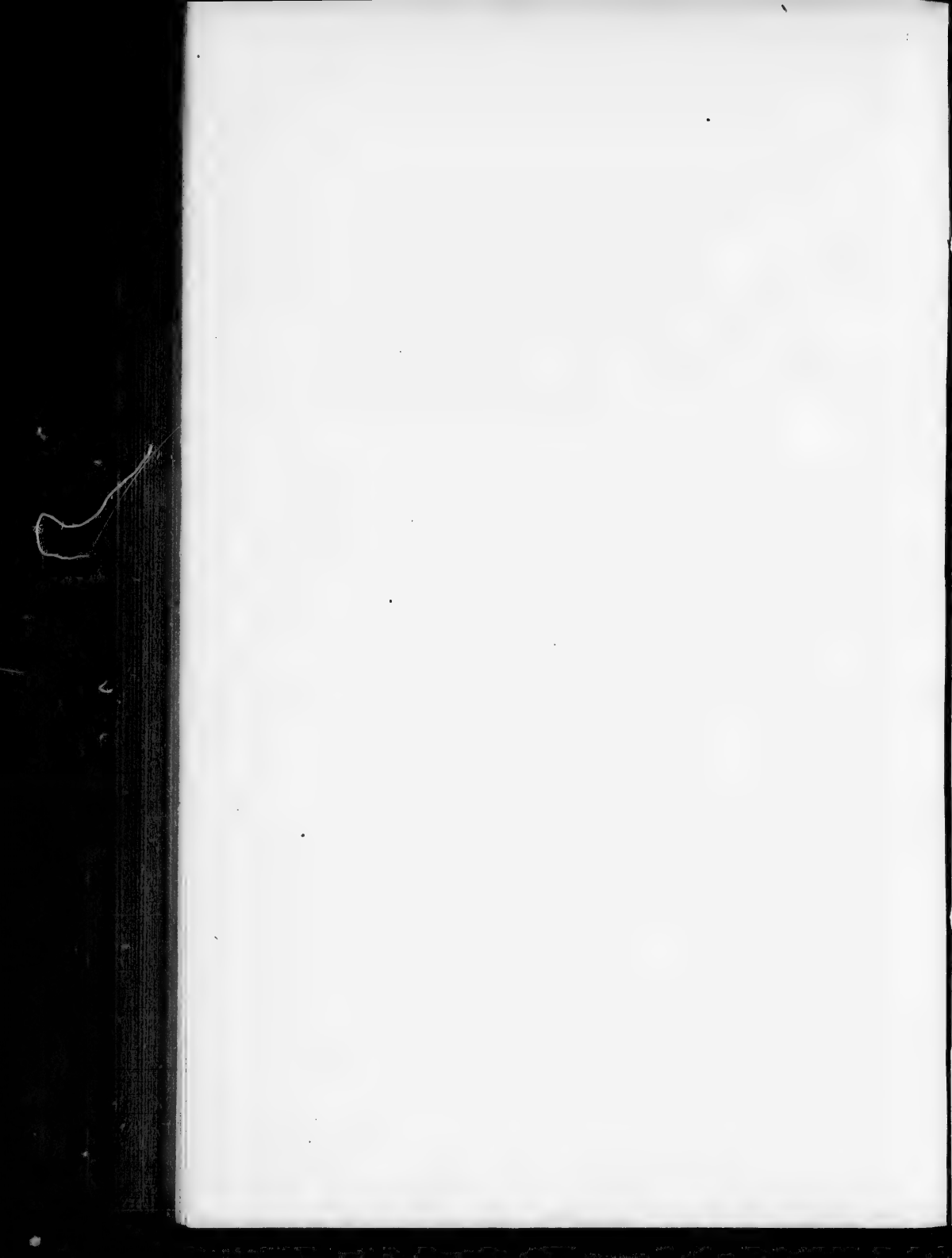
GAROUTTE, J. Defendant was convicted of a felony, and, as ground for a new trial, he alleged by affidavit, which was not contradicted, that during the argument of the case to the jury the judge absented himself from the court room for the period of twenty minutes. It was also alleged by the affidavit that during such absence the judge was out of sight and hearing of the proceedings going on within the court room. The foregoing facts being undisputed, we are fully satisfied they demand a retrial of the case. The argument of the case to the jury is as much a part of the trial as the introduction of evidence. And evidence may be introduced before the jury, in the absence of the judge, if the practice here pursued may be held justified within the law. It is hardly necessary to present either argument or authority to show that neither of these practices can be justified. The judge is a component part of the court. There can be no court without the judge. And all that was done in the absence of the judge was in fact done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law. As fully supporting these views, we cite *O'Brien v. People*, 17 Colo. 561, 31 Pac. Rep. 230; *Turberville v. State*, 56 Miss. 793; *State v. Beurman* (Kan. 1898), 53 Pac. Rep. 874. The judgment and order are reversed, and the cause remanded for a new trial.

VAN FLEET, J., and HARRISON, J., concurred.

NOTE (by J. F. G.).—Quite similar to the above is the case of *Thompson v. People*, 144 Ill. 378, 32 N. E. Rep. 968 (decided in 1893), where a conviction for assault with intent to commit murder was reversed because the trial judge was in his chambers during the argument of counsel, preparing the instructions for the jury, and did not hear the argument. In reversing the conviction the court said:

"Several errors are relied upon by counsel for the plaintiff in error to reverse the judgment, but we will only consider one of them, as that is conclusive of the case. It appears from the bill of exceptions contained in the record that during the argument of the case before the jury, the presiding judge left the court room and entered his private room, and remained out of the court room during the entire closing argument of the State's Attorney. It is true the judge was in a private room adjoining the court room, preparing instructions to be given to the jury, but he could not, and as appears from the record, did not hear the argument to the jury, and during the closing argument repeated objections were interposed to remarks of the State's Attorney, but, as the judge holding the court was absent from the court

room and there was no presiding judge present to pass upon the questions raised or attempted to be raised, they were never decided. On the trial of a criminal case before a jury the defendant has a right to be heard before the jury in person or by counsel, as he may elect, and the People have a right to be heard through the State's Attorney or such other person as may be selected for that purpose. This is a right guaranteed by law. Indeed, the argument before the jury is a part of the trial of a cause, as well as the introduction of evidence to prove the innocence or guilt of a defendant or any other fact at issue on the trial. If the presiding judge may leave the court room and engage in other business during the argument before the jury, he may upon the same ground leave while the evidence is being introduced during the progress of the trial at any other stage of the proceeding. Under our system of practice in the circuit court, during the progress of any judicial proceeding, the law requires a presiding judge to sit during each and every stage of such proceeding, whether it be a jury trial or some other proceeding in court, and the presence of the judge cannot be dispensed with. The rule here announced is fully sustained by *Meredith v. The People*, 84 Ill. 479, where it was held that the presence of the judge during the argument of a criminal case could not even be dispensed with by consent of the parties. In this case, however, there was no consent. Had the judge stepped out of the court room into his private room for a short time, where he could still hear the argument and where he would have been in a position to pass upon any question which might properly arise in the argument, we are not prepared to say that an error would have occurred. But such was not the case here; no part of the closing argument for the State was heard, and, although several objections were made to different portions of the argument, they were not, on account of the absence of the judge from the court room, passed upon or decided. Under the law the defendant, who was on trial for a serious crime, one which deprived him of his liberty, had the right to the presence of the presiding judge during the argument of the case before the jury, and the absence of the judge was, in our opinion, an error of sufficient magnitude to reverse the judgment."



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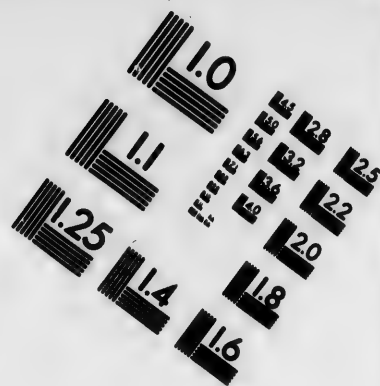
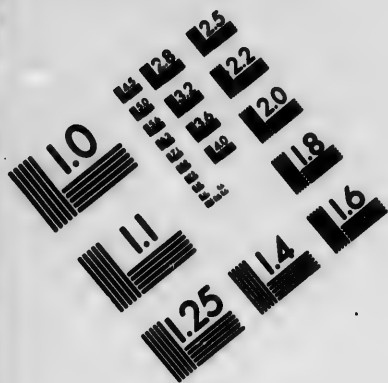
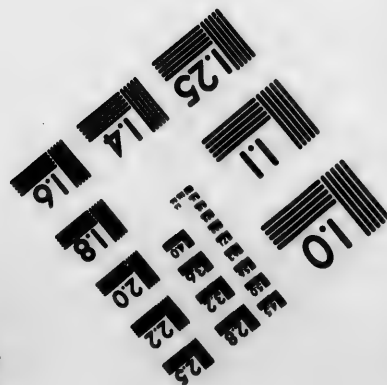
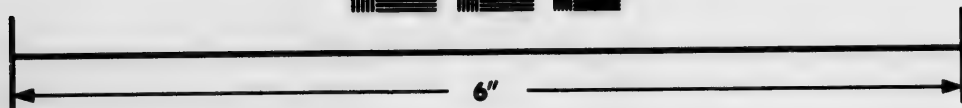
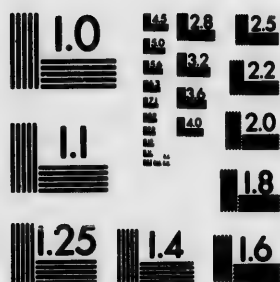


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